

B.L.d

T R E A T I S E

UPON THE

Law of Mortgages.

By JOHN JOSEPH POWELL, Esq.

K

OF THE MIDDLE TEMPLE,

BARRISTER AT LAW.

Haud ignara mali, miseris succurrere disco.
ÆNEI. LIB. I.

THE THIRD EDITION,

REVISED, CORRECTED, AND GREATLY ENLARGED,
BY THE AUTHOR:

V O L. I.

L O N D O N:

PRINTED BY HIS MAJESTY'S LAW PRINTERS,
FOR WHEILDON AND BUTTERWORTH,
FLEET-STREET.

1791.

24



TO

CHARLES FEARNE, Esq.

AS the period was drawing near, when the following Treatise was to be submitted to the public eye, my feelings suggested to me, how much I stood in need of the kind introduction of a respectable name, known to that public, before whose tribunal I was going to appear. Among the exalted characters which now adorn the profession of the law, the distinguished eminence which you have so justly acquired, as well as your high reputation for general science, excited in me an earnest desire, that I might be permitted to use the sanction of your name on this occasion. I felt that, under such auspices, I should enter with more confidence into the dan-

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gerous, and, to me, untrodden path of an author. It is therefore, Sir, with the most lively gratitude, that I express the sensible impression your kind condescension, in acquiescing in this request, has made on my mind; and intreat you to accept my acknowledgments for your indulgence in this respect, which has added to the favours already conferred on me; an obligation, that I shall always reflect upon with pride and pleasure. I am,

S I R,

Your most respectful,

most obliged,

and obedient Servant,

JOHN JOSEPH POWELL.

TO THE

R E A D E R.

THE kind reception with which my former labours on the subject of the following Treatise have been favoured, by the profession and the public (a conviction, that, as the principles which apply to the absolute and conditional alienation of property are the same, the present subject has a general connection with every branch of conveyancing) and the persuasion, that the addition of a variety of observations, which have occurred in the course of reading and practice, would add greatly to the utility of the work ; all these causes have concurred, to induce me to extend it into two volumes, in which I have

a 3 endeavoured

endeavoured to complete the collection of cases, determined on this subject, now extant in the reports, and where they admit of it, so to state them, as not only to shew their immediate relation to the particular subject of mortgages, but their principles and tendency, with regard to the laws of property in general.

With this view, a chapter* has been introduced on the subject of possession, the purport of which is, to shew in what instances it is necessary, that the contract should be followed, by the delivery of the thing, which is the subject of it, whether the contract be absolute or conditional, in order to render it free from the imputation of fraud or collusion; and to point out the different modes of delivery, recognized by the law, according to the capacity, size,

* Cap. ii.

and

and local situation of that which is the subject of it. This leads to the discussion of those statutes, which the wisdom of the legislature has enacted, to guard the subject against fraud, and of those general principles of the law, which are applicable to them. Under this head also, observations are offered on the analogy, between the possession of personal things by actual delivery, and the possession of lands by the title deeds ; from whence some deductions are made, as to the probable consequences of a wilful omission by a purchaser, to secure the latter, where the circumstances are such as admit of so doing.

Another chapter has been added,* on the subject of the qualifications required in a mortgagee ; in which is introduced, a very important branch of legal learning, immediately connected

* Cap. iv.

with

with the principal subject of the work, I mean the different capacities of trustees, executors, &c. to raise money by mortgage or sale, arising from the forms of their constitution, the nature of their trust, the object in view, and from other causes : here too I have taken an opportunity of considering the doctrine of raising portions, on vested, contingent, and reversionary terms, by construction of law, on the intent of settlements; and have collected and investigated the cases, which occur on that important and necessary branch of learning; a subject, which long occupied the equity side of Westminster-Hall, and which, though now pretty well settled, still remains, in some instances, open to farther discussion.

Chapter v. which points out who may be a mortgagee; and chapter x. in which the nature of an equity of redemption is defined, are new.

Chapter

Chapter iv. of volume ii. is substituted in the place of chapter xii. in the former edition, which treated "on the fund out of which a mortgage is to be redeemed." In this I have not confined myself merely to the redemption of mortgages, but have also endeavoured to shew, out of what part of a testator's property, his debts, charges, and incumbrances in general, are to be disbursed: this leads to an enquiry into the foundation of the privilege of exemption from the debts of the owner, which until of late years, appertained to real property in England; the periods at which encroachments began to be made on that privilege, the foundation and consequences of that equity which arose in its favour, in relation to its exoneration by the personal estate; the different modes by which real property may be charged with debts, and those, by which personal property, which is always primarily liable, may be exempted from
exonerating

exonerating real property, from demands of this nature ; and also the very curious, refined, nice, and subtle doctrine, which relates to residuary bequests ; a subject on which no treatise has hitherto appeared, and which, in a variety of instances here collected and discussed, have exercised the skill and ingenuity of some of the most distinguished lawyers, who have adorned the courts of Westminster-Hall. Under this head also, I have stated and illustrated, by the cases extant on the subject, the rules of marshalling real assets, as between estates descended, generally devised subject to the payment of debts, and specifically, charged with it, and which were involved in considerable difficulties, till simplified and settled in the case of *Downe* and *Lewis*, * by the luminous talents of that eminent lawyer who now presides in chancery, as justly admired for all the splendid endowments, necessary to constitute a

* Reported by *Mr. Brown*, *vid. infra*, vol. ii.

great judge, as the most illustrious of his predecessors.

In chapter xii. of the first volume, which treats on the doctrine of tacking, some new observations are also introduced upon the origin and nature of terms in gross, and terms attendant upon the inheritance; and the manner is pointed out, in which they follow, on equitable principles, the estate on which they are attendant (as a shadow does the substance); the propriety and necessity of a cautious attention in trustees, to the state of lands, on which such terms are attendant at the time of assigning them, is suggested, and the necessity likewise of such assignment, to secure a purchaser, strongly inculcated.

A chapter is likewise added at the end of the work, comprizing a variety of cases, which do not properly fall under any of the particular heads before discussed,

uffed, or which I have thought, since those chapters went to press, deserved a more full illustration ; amongst others, is considered the capacity of a mortgage to be the subject of a gift *mortis causa*.

With these improvements, I now submit the third edition of this work to the candour of that profession, who have, already, abundantly recompensed my labours, by distinguished marks of favour and approbation ; trusting that such faults and inaccuracies, as occur, will be imputed, not to any want of personal industry and attention, but to the variety of the subject undertaken, comprizing, in one point of view or in another, the whole doctrine relating to the transfer of property.

It is necessary to observe, that the references in the side notes to the preceding part of the book, were, by an oversight,

fight, permitted to pass as they stood in the last edition, until it was too late to correct them ; but the omission will be easily rectified by a reference to the Index to Cases.

No. 29, *Carey-Street*,
Nov. 6, 1791.

(11)

subject referred to in the last page of the
the 1st volume, and is now the 1st
volume, and the 1st volume of the
series is now the 1st volume of the
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- Zouch *v.* Parsons. vol. i, 249.

The Reader's Attention is requested to the following
corrections.

Page 2, line 23, for *sevetur* read *servetur*.

22, 1, before *which* insert *on*.

48, 24, for *accountant* read *accountants*.

69, 21, after *no* insert *beneficial*.

25, *ibid*.

102, margin, for 484 read 485.

235, 1, in the margin, insert *Sir John Cotterel*,
v. Hampson, 2 *Vern.* 5.

386, 24, for *were* read *was*.

390, 23, for *decmed* read *declared*.

483, margin, read 1 *Vez.* 64.

492, 19, margin, insert *Earl of Pomfret v. Lord*
Windsor, 2 *Vez.* 185.

(1)

C A P. I.

**Of the Origin and several Kinds of
Mortgages.**

THE notions of mortgaging and redemption are, by some, thought to have originated with the Jews, one great object of whose law, was the constitution of a just and equal *agrarian*, with a view to keep their lands in the same tribes and families. For this purpose they appointed a certain period, at which, whatever alienations might have taken place in the mean time, all landed property should revert to its original owner. The time of this general restoration of property was called the Jubilee, and occurred once in fifty years; therefore, if any were compelled, by necessity, to part with their lands in the mean time, they could transfer no interest therein, or incumber them farther, than to the next general jubilee: with a view to that, therefore, they made their computations,

VOL. I.

B

and,

Cunæus

II-12-13-14.

Ancient Uni-

vers. History,

vol. 2, 130, 131.

Bacon's Abr.

Tit. Mort-

gage.

and, according to the distance from thence, was the extent of interest, in land, that could be transferred to a buyer; but the vendor, by their law, had power at any time to redeem, repaying the value of the lands, from the time of redemption to the jubilee, and if they were not repurchased before the year of jubilee, then the lands, of course, reverted, released from the debt, to the vendor and his heirs.

But mortgaging, as practised with us, seems to owe its introduction more immediately to the Roman law, which distinguished between things pledged or hypothecated, and things mortgaged.

Just. Cod. l.
4. t. 54. f. 2.

In the following passage, we have the description of an English mortgage of lands in the Roman law: "*Si fundum parentes tui ea lege vendiderunt, ut sive ipsi, sive heredes eorum emptori pretium quancunque, vel intra certa tempora obtulissent, restitueretur; teque parato satisfacere conditioni dictæ, hæres emptori non paret, ut contractus fides sevetur, actio præscriptis verbis, vel ex vendito tibi dabita: habetur ratione eorum, quæ post oblatam ex pacto quantitatem ex eo fundo adversarium pervenerunt.*"

And

And the following description is equally applicable to a mortgage of moveables: Cod. l. 4. t. 54.
f. 7.

“ Si à te comparavit is, cuius meministi, et convenit, ut si intra certum tempus soluta fuerit data quantitas, sit res inempta, remitti hanc conventionem rescripto nostro non jure petis. Sed si se subtrahat, ut jure dominii eandem rem retineat: Denunciationis et obsignationis depositionisque remedio contra fraudem potes jure tuo consulere.”

The striking distinction between a mortgage of lands or goods, and a pawn of goods, is, that in the former case, the mortgagee has an absolute interest in the thing mortgaged, whereas the pawnee has but a special property in the goods, to detain them for his security. Noy 137.
Cro. Jac. 245.

A mortgage with us, is an immediate conveyance with a power to redeem, and gives a legal property.

It being a fixed rule in the feudal law, that, *feudalia, invito domino, aut agnatis, non recte subjiciuntur hypothecæ, quamvis fructus posse esse, receptum est*; the feudatory could not obtrude a tenant on the lord without his leave, such tenant being the person on whom the lord depended Corvin Dig.
268.

for his personal service in war and peace: And, as the tenant could not aliene without licence, so neither could he mortgage without licence.

9 H. 3. 37.
18 Ed. 1.

But, when a licence was given for alienation about the time of Hen. III. and it became a maxim in law, *that the purity of a fee-simple, imported a power of disposing of it as the owner pleased*, there were two ways of mortgaging lands introduced, which Littleton distinguishes by the names of *vadium vivum*, and *vadium mortuum*.

The *vadium vivum* was, where a man borrowed 100*l.* of another, and made over an estate of lands to him, until he had received that sum out of the issues and profits thereof; and was so called, because neither the money, nor the lands, were lost; for the latter were *constantly* paying off the former, and were not left as a dead pledge, in case the money was not paid.

Litt. Sec. 332.
Co. Litt. 205
Terms de la
ley 448.
2 Black.
Comm. 157,
168.

The *vadium mortuum* (to which our attention hereafter will be particularly applied) was, where one man borrowed of another a specific sum of money, and granted him an estate, as a security for the re-payment, on condition, that if the mortgagor repaid
the

the mortgagee the sum lent, on a certain day mentioned in the deed, then, that the mortgagor might re-enter thereupon: And was so called, by *Littleton*, because it was doubtful whether the feoffor would pay the money at the day limited, or not; and if he did not pay it, then the land, which was but in pledge upon condition, for the payment of the money, was not to be restored to the owner, and therefore was considered as dead to him; and if he did pay it, then the pledge was to be restored to him, and, consequently, the tenant of the land in pledge had no farther interest therein.

Cragii Jus.
Feud. 234,
235.

Of the last species of mortgages there are two kinds.—First, mortgages of the freehold and inheritance; and, secondly, of terms for years.

Madox 318,
319.

The ancient way of making mortgages of the freehold and inheritance, was by a charter of feoffment, on condition that if the feoffor, or his heirs, paid the sum borrowed to the feoffee, or his heirs, at a day appointed, he should re-enter and re-possess.

Madox 318,
319.

Sometimes the condition was contained in the charter of feoffment, and sometimes it was defeazanced by a distinct instrument;

for, as a man might annex a condition to his feoffment, the maxim being that, *cujus est dare, ejus est disponere*, so he might annex a condition thereto, by another deed, bearing date, and executed, at the same time; for being executed at the same time, it is *really* but one and the same disposition; but if the defeazance, or condition, was contained in a deed executed after the feoffment, it came too late; because livery of seisin, or corporal tradition, being necessary at common law, to all conveyances of land, no mortgage thereof was valid unless possession also was delivered to the mortgagee, and the livery, *coram paribus* in such case, attesting an infeudation, in which there was no condition, the tenant must hold the land according to that investiture.

Glanvil l. 10.
c. 8. & Black.
Com. 160.

Co. Litt. 207:
a. 209. a. b.
Litt. Sec.
335. 338.
9 Co. 77.

Again, a distinction was taken at common law, where a man granted an estate to another by way of mortgage, for securing a sum of money at a day appointed, in the nature of a gratuity or gift; and, where a man was indebted to another in a certain sum, previous to the grant, and made a mortgage of his estate, in fee or otherwise, to secure the same to the mortgagee: for in the former case, a tender of the money within the time, and by the person named

named in the condition, discharged the estate mortgaged from the condition, and gave to the mortgagor a right of entry: Because, there being no debt, independent of the condition, the money was considered, in law, as collateral to the land, that is, not parcel of it; and the mortgagor, having performed the condition as far as was in his power, and being prevented from completing it by the refusal of the mortgagee, was intitled to have his lands again; and, then, the mortgagee, having no farther lien thereon, or any *personal action*, was left without any remedy for his money: But, in the latter case, although, by tender of the money to the mortgagee, and his refusal, the mortgagor became intitled to enter into the land, freed for ever from the condition; yet the debt still remained, and might be recovered, by action of debt; for it was a *duty* distinct from the condition, and therefore, not lost by the tender and refusal,

In the performance of conditions, a distinction is made between those which are to create an estate, and those which are to destroy it; for the former may be performed, by construction of law, as near the condition as may be, and according to the intent and meaning thereof, though the letter and

Co. Litt.
219. b.

words cannot be complied with; but the latter are to be strictly construed, unless in special cases.

Co. Litt.
205. a. 206. a.
213. a. 221. b.
1 Co. 22. Sir
T. Wyatt's
case, Cro. Car.
427.

Conditions, annexed to estates, granted by way of mortgage, were considered to be of the former description; for although, by the performance of the condition, the estate was to be divested out of the mortgagee; yet it was with intent to re-instate the mortgagor in his inheritance.

Co. Litt. 221,
222. Hard.
463. Cro. Car.
191.
1 Eq. Ca.
Abr. 311. 5.
Bac. Abr.
632.
Vid. 1 Black.
Rep. 456.

However, these sorts of conveyances, by way of mortgage in fee, were at first found to be attended with great inconveniences; as, if the money was not paid at the day, so that the condition was forfeited and the estate became absolute, the estate was thenceforth subject at common law to the dower of the wife of the feoffee, and to all his other real charges and incumbrances; for though, if the feoffor performed the condition, then he might re-enter, and re-possess himself in his former estate, and consequently was in, above all charges and incumbrances of the feoffee; yet, if he did not *literally* perform the condition by payment of the money at the day, then the estate became *legally* subject to the charges and incumbrances of the feoffee, though the money should be afterwards

wards paid, and the estate re-conveyed to the feoffor; for till *Henry the VIIIth's* time, the widow of a trustee held her dower, the husband his curtesy, the lord his escheat, and the king his forfeiture, free from the trust,

To avoid these inconveniences, the second sort of mortgages were adopted, and it became usual to grant only a long term of years, by way of mortgage, with condition to be void, upon re-payment of the mortgage-money: which course is now frequently used, principally because, on the death of the mortgagee, such term becomes vested in his personal representatives, who now are (as will be shewn) intitled in equity to receive the money lent, of whatever nature the mortgage may happen to be.

2 Black. Com.
158.

But courts of equity, after their jurisdiction became firmly established, put mortgages in fee upon the right footing, maintaining the power of redemption, as an equitable right inherent in the land, and binding all persons, whomsoever, whether claiming in the *per*, (*i. e.*) by the act of the mortgagee as tenant in dower, by statute *Staple*, *Elegit*, &c.; or in the *post*, (*i. e.*) by the act of the law, as tenant by the curtesy, and lord by escheat: and the principle upon which

Cro. Car. 191.
Hard. 465.
469.

which they proceeded was, that the payment of the money does, in the consideration of equity, put the mortgagor *in statu quo*, since the lands were originally only a pledge for the money lent.

And since this right or power of redemption has been so understood, mortgages in fee have again become usual; for altho' mortgages for terms of years were free from the inconveniences attending mortgages in fee, with respect to tenant by dower, curtesy, &c. yet they were not without objection, as in case of fore-closure on non-payment, the mortgagee became only a termor, the fee simple remaining in the mortgagor,

Bac. Abr. 633.

Mortgages, by way of creating terms, were formerly by way of demise and redemise. Thus, if *A.* borrowed money of *B.* he, thereupon, demised land to *B.* for a term of 500 years absolutely, with common covenants against incumbrances, and for farther assurance; and then *B.* the day after, re-demised to *A.* for 499 years, with condition to be void on non-payment of the money at the day appointed. But the common method of mortgaging now, is, by a demise of the land for a term, under a condition to be void on the payment of the mort-

mortgage-money and interest, with a covenant, inserted at the end of the deed, that, until default shall be made in the payment of the money, the mortgagor shall receive the rents, issues, and profits, without account.

And it is now usual to insert, in the mortgage deed of a term for years, or the assignment thereof, a covenant from the mortgagor for himself and his heirs, that, if default be made in the payment of the money at the day, then he and his heirs will, at the costs of the mortgagee and his heirs, convey the freehold and inheritance of the mortgaged lands to the mortgagee and his heirs, or to such person or persons (to prevent merger of the term) as he or they shall direct or appoint. For the reversion, after a term of five hundred or one thousand years, being little worth, and yet the mortgagee, for want thereof, continuing but a termor, subject to forfeiture, &c. and not capable of the privileges of a freeholder, it is but reasonable that when the mortgagor cannot redeem the land, the mortgagee should have the whole interest and inheritance of it, to dispose of as absolute owner.

Bac. Abr. 633.

Great

Great inconvenience having been suffered by mortgagees, from the difficulty and delay attending bills to foreclose, the ingenuity of modern times has invented a mode of contracting, by which the mortgagor may, after a given time, procure his principal and interest by a sale of the mortgaged estates, without being under the necessity of applying to a court of equity. This is done by taking the conveyance of the fee to trustees in trust for the mortgagee for a term of years subject to redemption, with remainder to the trustees in trust, in default of payment at the time stipulated, to sell the estate and to apply the purchase-money, after defraying the expences incurred in discharging the trust, in the payment of the mortgage-money and interest, and then to pay over the residue, if any, to the mortgagor.

If a bond be given by the mortgagor to the mortgagee, conditioned for the performance of all covenants, payments, articles, and agreements, comprised in the mortgage deed; non-payment of the mortgage-money, according to the proviso in the deed for repayment at a certain day or days, will be a breach of such condition.

This

This question seems to have been first agitated in the case of *Briscoe* versus *King*. There a deed of feoffment was made in consideration of 110*l.* with a proviso, that if the feoffor paid such sums at such a day, the feoffment should be void, and he might re-enter; with covenants to save harmless from incumbrances, and to make farther assurance. And there was also a bond from the feoffor, conditioned for the performance of all covenants, payments, articles, and agreements, comprised in the deed. On an action upon this bond, the breach was assigned, for that the feoffor did not pay such sums upon such days according to the proviso. And thereupon there was a demurrer, and it was contended, that in regard the feoffor was obliged to perform the payments, articles, and agreements, in the deed mentioned, and there was not any payment mentioned but what was mentioned in the proviso, therefore he was obliged to perform that; but the court said, for as much as there was not any covenant, it was a proviso in advantage of the feoffor, that if he paid the money he should have his land again; and it was in his election to pay the money, or to lose his land, which would be a sufficient loss unto him; therefore the condition of the bond did not

Briscoe v.
King, Cro. Ja.
281. Yelv. 296.

extend thereto, but was confined to the other covenants, namely, to save harmless from incumbrances, and rents and arrearages of rents. But in respect that, if judgment should be entered, the obligee would lose his bond; they gave day to advise until the next term, that in the interim the parties might compound.

Tooms v.
Chandler,
2 Lev. 116.
3 Keb. 387.
79.

But in the case of *Tooms and Chandler*, in which debt was brought upon an obligation to perform all the covenants and conditions in an indenture of mortgage; in which indenture there was a proviso, that if the mortgagor paid the money at the day, the mortgage should be void. A breach was assigned in non-payment of the money at the day, upon which there was a demurrer. *Hale* was at first of opinion, upon the ground mentioned in the preceding case, that this was no breach; but *Twisden* held otherwise, and cited a case of *Westbrook, Hill. 22 Car. 1. B. R. Rott. 116.* to have been so adjudged; whereupon the case was adjourned: and afterwards, at another day, *Twisden* brought the record of *Westbrook's* case into court, upon which *Hale* changed his opinion, and gave judgment for the plaintiff.

But

But taking the bond with a condition for performance of covenants, frequently occasions difficulty in the pleadings in assigning the breach, and embarrasses the mortgagee. The better mode seems to be, to take a bond simply conditioned for payment of the mortgage-money.

Accepting a mortgage does not estop the mortgagee from saying, that the mortgagor had no estate in the premises mortgaged.

Thus in covenant, on mortgage, by the defendant to the plaintiff, to pay so much seven years from the time of the mortgage made, and so much yearly out of lands in loan to J. S. breach was assigned, that the defendant had no estate to convey; the defendant, on oyer of the indenture, pleaded that J. S. was tenant for life, and that the defendant was seised of the reversion in fee sufficient to convey. To this the plaintiff demurred; *et per curiam*.—The indenture of mortgage is no estoppel, to say, in an action of covenant, that the defendant had no estate, though in debt for rent it is. *Sed adjournatur.*

Cordinglee v.
England,
3 Leb. 112.
54.

It

It is not unusual, for the party lending the money, to stipulate that it shall lie on the land for a given period of time, which agreement is made part of the deed, and hath been considered by the best authorities as binding upon the parties.

C A P. II.

Of the Possession of the thing mortgaged, and when it ought to be given by the Mortgagor to the Mortgagee.

A MORTGAGE being, as has been stated, a contract of sale executed, with power to redeem, must have all the properties and qualities incidental to the validity of an absolute disposition.

An essential circumstance necessary to the validity of every conveyance of property, whether real or personal, is, that it be perfectly free from fraud or collusion; which are things the common law universally abhors, and, therefore, makes void all acts that depend upon them, though otherwise in themselves good.

30 Edw. iii.
cap. 6.
13 Eliz. cap. 5.
27 Eliz. cap. 4.
21 Ja. i. cap.
19.

With a view to enforce this principle, several statutes have made void all fraudulent conveyances of lands, tenements, hereditaments, goods, and chattels, as against creditors and purchasers.

But what circumstances amount to fraud or covin, is always a question of law upon the facts of each particular case. Among other incidents which have been considered as fraudulent, we find that of the vendor continuing in full possession, and having the power of using things conveyed as his own, after an absolute and unqualified alienation; whereby the vendor is enabled to defraud and deceive others, by continuing to traffic with the subject by him before conveyed to another.

This observation leads us to investigate what degree of possession of a thing mortgaged ought to be given up by the mortgagor, to prevent the mortgagee from the imputation of fraud in respect to third persons; and in the pursuit of this enquiry, it will be necessary to consider, First, What things are capable of being mortgaged: Secondly, In what state or condition they may be mortgaged: Thirdly, The extent in which their nature, state, or condition, varies the degree of

of the possession, which ought to be given of them.

First, As to what things are capable of being mortgaged.

Every thing which may be considered as property, whether, in the technical language of the law, denominated real or personal property, may be the subject of a mortgage.

Advowsons, rectories, and tythes, may be the subject of a mortgage.

Reversions and remainders, being capable of grant, from man to man, are mortgageable.

Possibilities, also, being assignable, are mortgageable, a mortgage of them being only a conditional assignment.

Rents, also, and franchises, as views of frankpledge, perquisites of courts, leets, fairs, markets, goods of felons, waifs, estrays, hundreds, ferries, warrens, and the like, may be made the subject of a mortgage.

Secondly, What state, or condition, things, capable of being mortgaged, may be in for that purpose.

Lands, tenements, and hereditaments, with respect to their capacities of being mortgaged, may be viewed in two lights, viz. First, As to their intrinsic nature:— Secondly, As to the estate possessed in them.

First, All lands are, in respect of their intrinsic nature, mortgageable; but notwithstanding they are so mortgageable, yet, in respect to the estate and property that the owner has in them, they may be otherwise; as if he be but tenant at will of them.

Secondly, As to the estate in lands, tenements, and hereditaments, necessary to make good a mortgage, it may be observed, that any estate which a man has in fee simple, fee tail, for life, or years, in any lands, or in any rent, or profit out of the same, may be mortgaged.

And if tenant in tail, and he that is next in remainder in fee, join in a mortgage, and after the tenant in tail dies without issue, in this case it is a good mortgage against him in remainder.

So if there be joint tenants, either of them may mortgage his undivided part or share.

And the law is the same with respect to tenants in common, co-parceners, &c.

Personal things, as goods and chattels, are likewise, in point of locality, moveable or immoveable, present or remote; and they admit of several rights therein, generally described under the terms rights in action, which include all personal things in action, and rights in possession, which include all personal things in possession.— And these rights may be mortgaged in various modes, according as the things to which they relate are circumstanced in point of locality; which circumstance gives rise to several distinctions as to the degree of possession of which they respectively admit, which will be better explained under the third head of enquiry, viz.

Thirdly, How the nature, state, and condition of things in mortgage, vary the degree of possession, which ought to be given of them.

And, in this respect, there is a material and obvious distinction between real property,

of which the vendor is in the visible possession, and personal property, of which the vendor is in the visible possession; for since the visible occupation and use of land, furnish no evidence whatever that the possessor is entitled to the property, because visible occupation and use may not only be founded on wrong, as commencing in a disseisin, or the like, but, though rightful, admits of a variety of qualifications; some other evidence than mere possession is necessary to evince property therein. Before the introduction of written instruments, it was only to be found out by resorting to the vicinage, who, when no transfer could be made but what was attended with acts of general notoriety, were well acquainted with each other's title; and since the introduction of deeds, and the invention of transfer through the medium of uses, it is only to be found out by resorting to the title-deeds. But personal things, when present, being absolutely in the power of the holder of them, the occupation thereof is the strongest index of ownership; for since there is no way of coming at the knowledge of who is owner of personal things, but by seeing in whose possession they are, there is no other medium for deciding on the property, but by concluding its annexation to that possession.

The law, then, which must always be so moulded as to correspond with the intrinsic nature of things, does not consider the retaining the visible possession of land, after the property is parted with, as any badge of a fraudulent intention of the parties to deceive third persons; because the visible possession, being in its nature ambiguous, as it may be in the hands of the tenant as well as the owner, no prudent man will, in contracting, lay any great stress on that circumstance, as a proof of title, but will require the deeds as the only true test of the property. But, upon the same principle, the law considers the visible retention of the possession of personal things, after the cession of the property, *prima facie*, as an indication of fraud; because it is difficult, unless in very special cases, to assign a reason why an absolute or conditional vendee of goods, for the reason holds equally in both cases, should leave them with the vendor, unless the transfer were only colourable, or the parties had in view the procuring a collusive credit to the vendor, from his possessing that, which, in fact, is the property of another.

In this view of the effects of possession, in evincing the right of property, we find, that in respect of real things, the possession of the

title deeds is, *prima facie*, as to them, what the possession and use of personal things present is as to personal things; and by a necessary analogy, the retention of the visible possession of the former in the one case, ought, it should seem, *if permissive*, to be equivalent to the retention of the possession of the latter in the other case,

I shall therefore first consider, in what cases possession retained, after a conditional sale, is fraudulent in respect of personal things, and the exceptions to the conclusion of fraud from that circumstance; and, secondly, the applicability of the cases, and reasoning thereon, to the instance of possession retained of the title-deeds, *with the privity of the mortgagee*, after a conditional sale of real things.

With respect to the condition in which creditors or purchasers stand, in relation to sales prejudicial to them, where the vendor continues in possession of goods sold, two statutes present themselves, in the first place, to our observation, *viz.* 13 *Eliz. cap. 5*, and 27 *Eliz. cap. 4*, which statutes, no distinction being therein made between conditional and absolute sales, provided they are fraudulent, must be considered as applicable to both instances; it being a settled rule of construction, "That statutes made
against

Twine's case,
3 rep. 81.

against fraud shall be liberally and beneficially expounded, so as to suppress the fraud."

And conveyances, made to the end, purpose, and intent, to defraud creditors and purchasers, being by these statutes, as to such creditors and purchasers, declared void, it became incumbent on courts of law and equity, which, in such cases, have a concurrent jurisdiction, on considering all the circumstances of each case, to decide whether a conveyance was made with intent to defraud. And in the exercise of this discretionary power, given by these statutes to adjudge of the intent from the circumstances, it has been held as to creditors, in respect to goods, that any neglect in leaving the vendor in possession, after absolute alienation of the property, which naturally tends to deceive creditors, is fraudulent within the statute of the 13th *Eliz.*; and accordingly, in *Twine's* case, wherein it was resolved, that the gift then in question had the signs and marks of fraud, one reason assigned was, "because the donor continued in the possession, and used them as his own, and by reason thereof, he traded and trafficked with others, and deceived them.

Stephens v. Sole, 1 Vez. 352, 1 Atk. 157.
Ryall v. Rowles, 1 Atk. 165.
Brown v. Heathcote, *ibid* 160.

3 Rep. 81;

Pre Chan. 286, 287.

A possession of a mortgagee (who is joint-tenant of goods mortgaged with the mortgagor)

mortgagor) *per my et per tout*, is not such a possession as will remove the presumption of fraud, if the mortgagor continue to exercise acts of ownership upon the things mortgaged.

vid. Ryall v.
Rowles & Vez.
348.

Therefore, if there be two partners in trade, and one of them take a mortgage of the utensils, stock in trade, debts, profits, &c. for securing a sum of money lent by him to the other, and, notwithstanding, suffer him to continue in possession of the partnership deed, stock in trade, and utensils, and to alter and dispose of the goods, and receive the debts as before, such mortgage will be fraudulent in respect to third persons; for, although the mortgagee being seised *per my et per tout*, will remove the necessity of an actual delivery; yet the mortgagor, being permitted to act after parting with all the interest, till redemption, renders the contract fraudulent, as otherwise a door would be open to fraud, by a partner being permitted to retain all the badges of ownership, to deceive the rest of the world.

And the conclusion of law would be the same, if the mortgage were made to a third person; for in such case the mortgagee ought to be admitted partner for a moiety.

But

But, as has before been observed, the delivery of personal things admits of several modifications, in respect of such things being in possession or in action, present or remote ;— which circumstances furnish exceptions to the general rule, by occasioning the substitution of other circumstances, in lieu of the actual delivery of possession we have above alluded to.

If personal things are in the visible possession of the vendor, and sold by him to another, if the vendee would have the contract to be clear of the imputation of fraud, actual delivery ought to be instantly made, unless, in the nature of the contract, something intervenes to delay or prevent such delivery.

But personal things in action do not admit of any visible possession or actual delivery, the vendor being himself, in such cases, possessed only of a right. The law, therefore, in that case, is satisfied with every thing being done towards a delivery, which the nature of the thing admits ; *ex. gratia*, delivery of all the documents by which the existence of the right can be evinced, accompanied with a transfer of the powers necessary to enforce the right. The simplest case of this kind, is the conditional transfer
of

of a debt on bond, which is only assignable in equity, and not at law. The reason why it is assignable in equity, is, because the assignor can furnish the assignee with all means necessary to reduce it into possession, by delivering the bond into the hands of the assignee to prove the debt, which is the *chose* in action, and by giving him an authority to sue in the obligee's name. On an assignment of a bond, therefore, the delivery of the bond, accompanied with a power to sue, is equivalent, in equity, to an actual delivery on the conveyance of goods in possession at law; for all that the nature of the thing admits, is done to divest the right out of the assignor, and vest it in the assignee. But if the bond be detained by the assignor, the assignee will be liable to the imputation of fraud; because then the debt, by the assignor continuing to hold the evidence of it in his hand, remains in his disposition, and he may assign it over to other persons, which is the mischief the statute of the 5th *Eliz.* of which we are now speaking, was intended to remedy.

Unwin and
Oliver,
Cooke's Bank-
Laws, 84.

Upon the same principle, debts mentioned in a schedule, though not capable of delivery, may likewise be assigned conditionally; but in such case notice to the persons

persons indebted, seems to be indispensably necessary to protect the assignee from the imputation of fraud against third persons, in case of a subsequent assignment; because, unless such notice be given, debts may be again and again assigned, without the possibility of the latter assignees detecting the fraud.

Personal things, in a remote situation, fall under the same principle; these admitting no actual delivery, they pass by delivering over the means of reducing them into possession, that being the only delivery of which they are capable. Vessels at sea are in this predicament: they may be mortgaged or absolutely sold, and possession transferred by delivery of the muniments respecting them.

Upon the same principle, the property of goods at sea is held by the possession of the bill of lading. A bill of lading is an acknowledgment, under the hands of the captain, that he has received such goods, which he undertakes to deliver to the person named therein. It is assignable in its nature, and by delivery and indorsement, with a view to a mortgage or sale of the legal interest in the property, is immediately transferred from the owner to the assignee of the consignee,

Evans v.
Martlett, 1 L.
Raym. 271.
Wright v.
Campbell, 4
Burr. 2050.
Coldwell v.
Ball, 1 Term,
Rep. 215.

gnée; and therefore, if goods consigned to generally are, *bona fide*, sold or mortgaged by him whilst at sea, and the bill of lading indorsed and delivered to the purchaser or mortgagee, together with the bill of sale, the vendee or mortgagee shall hold them by virtue of the bill of sale, though no actual possession be delivered.

Lichbarrow v.
Mason, et al.
2 Term, Rep.
63.
Lempriere v.
Palley, 2 Term
Rep. 485.

And as between the owner or vendor of goods so circumstanced, and the assignee of the consignee, or vendee, where the transaction is *bona fide*, the bill of lading transfers the property absolutely, and in all events, although, as between the vendor and vendee, the contract, where the delivery is at a distant place, is ambulatory, and in case of the insolvency of the vendee in the mean time, the vendor may stop the goods *in transitu*; because the latter rule is founded upon an equity arising between the original parties, and which the law has adopted, and does not affect the rights of third persons who have trusted to the indorsement, and on the faith thereof advance their money. And this is consistent with the broad general principle of law, that wherever one of two innocent persons must suffer by the acts of a third, he who has enabled such person to occasion the loss, must sustain it. Therefore,

if a consignee of goods upon the sea assign the bills of lading to a third person, as a security by way of mortgage of them, the equitable as well as legal right of such consignee is thereby instantly and completely divested; and the assignee has a complete title in law and equity, which cannot be affected by the consignee whilst the goods are *in transitu*.

And if the assignment of goods on the sea were merely equitable, and did not amount to a sufficient legal sale (as if there were merely an assignment and delivery of the bills of lading, without an indorsement of them and direction to deliver them to the assignee, of which the case of *Brown and Heathcote* 1 Atk. 188. furnishes an example) it seems that the original owner could not defeat the assignee, although he should intercept the goods *in transitu*; because, in such case, both parties would stand merely upon equitable claims, and then he ought to have them, who has the superior equity; and the assignee, whose equity is a *specific* lien upon the things, derived under the assignment, seems, to me, to possess that character.—*Sed quære*.

But, if the assignee of the vendee, or consignee take them with notice that they are not paid

vid *Salamons v. Nissen*, 2 term, rep. 674.

paid for, so that the transaction is a fraud between the vendee or consignee, and the assignee, to cheat the real owner of his goods, such assignee will then stand in the place of his assignor, and be affected with the same equity.

**Caldwell v.
Ball, 1 term,
rep. 205.**

And if there be several bills of lading of different imports, that person who first gets possession of one of them, by delivery of the owner, or shipper, or his consignee, by way of security, or as vendee of the goods, will be entitled to the consignment, he having the first legal right. And if the holders of any other of the bills of lading first get possession, it may be recovered by action of trover;—because bare possession conveys no title, as between persons claiming under different rights; in such cases, therefore, the only question is, Who has the legal title? for the person who first obtains a right under the legal title must prevail.

**Vid. Stephens
v. Sole, cited,
1 Atk. 170.**

But such sale would not avail against creditors or subsequent purchasers with possession delivered, if a vessel or goods therein, were in a state in which they admitted of being actually delivered; and, therefore, if one sold hoys or other vessels on the river, redeemable, and the assignor was left in possession

possession, and continued to work them and exercise acts of ownership on board them; such an assignment would clearly be held to be fraudulent.

If a ship at sea, after having been sold, were permitted to come back, and go on another voyage, it is presumed that would alter the case, and make such sale fraudulent.

Vid. ex parte,
Matthews;
2 Vez. 272.
Hall v. Gurney,
Cooke's Bankrupt
Laws, 231.

The delivery of the key of a warehouse, is a delivery of the goods therein contained, if from their bulk, they admit of no other delivery.

And generally, if, in the nature of the transaction, no delivery can be made of goods sold, although the same are present, possession retained seems to be no badge of fraud.

As if one who was considerably indebted, in order to give one of his creditors a preference, were to make an assignment to him, without the privity of such creditor, of a part of his furniture, or the like, and an execution were immediately afterwards, and before notice given or possession taken, executed against him, and all his furniture

taken, such an assignment would, I presume, be good, and the goods transferred thereby not subject to the subsequent execution; for, an acceptance is not necessary to the transfer of property, the law presuming an assent to accept that which *prima facie* imports a benefit to the acceptor; the use and property in the goods is therefore forthwith divested out of the assignor, and vested in the assignee; and if so, nothing can again re-vest it in the assignor, unless it be an act of the assignee, which will make the contract fraudulent as to third persons: but the very nature of the transaction, in the instance stated, precludes the possibility of any fraud being practised on his part.

And the same principle would apply, if the object were to secure a future contingent debt, which might or might not arise according as circumstances turned out.

As if a man were to assign goods to his sureties in a recognizance, entered into on his being appointed receiver of a lunatic's estate, that he should account for what he might receive under the orders of the court; it should seem that such assignment would be good against an execution subsequently executed upon them.

So if an assignment were made under the apprehension of legal duress, that circumstance, it is presumed, would remove the implication of fraud from possession retained; as if a man, confined in a spunging-house for debt, were to assign a part of his goods to a creditor as a security for the debt, and in order to procure his discharge. In such case, the goods being left in the possession of the debtor for a reasonable time after the assignment, and until proper means could be taken to remove them, would not make the assignment fraudulent.

Another ground, upon which cases have been considered as not within the purview of this statute, is, that by the specific words of the contract, possession was not meant to follow immediately thereupon; for the circumstance which stains the transaction with fraud, is the false appearance held out, when one thing is done, and an appearance permitted which imports the contrary; an absolute unqualified transfer of the right to the vendee, but possession and use retained by the vendor with no other object but to defraud. But there can be no fraud where the appearances agree with the real state of things.

And what was the intrinsic nature of the contract, as to the retaining or parting with the possession, may be made out from the deeds where the transaction is in writing, and where the transaction is in *pais*, by such parol evidence as can be adduced for the purpose of proving it.

Bucknal et al.
v. Roiston,
Pre Chanc.
285.

The strongest case of the former description is that of *Bucknal* and *Roiston*. There *B*, supercargo of a ship which was to go a voyage to the *East Indies*, having shipped on board goods and commodities, borrowed money on bottomry of *A*, and at the same time made a bill of sale of the goods and commodities, and of the produce and advantage thereof to *A*, in nature of a mortgage, as a security for the money lent. The ship went her voyage, and these goods were sold, and others bought with the money arising by the sale, and those again invested in other goods, and so there had been several barter and exchanges of several sorts of goods. The ship returned, and *B* died at sea, or on his return home; and it became a question between a judgment creditor of *B*, who got possession of these goods, and *A*, which of them should have the property. And one ground urged on the part of the judgment creditor was, that *B*'s keeping possession of the goods

goods after the sale, made it fraudulent and void as to creditors. *Sed per Cowper* Chancellor, the trust of these goods appeared upon the very face of the bill of sale. Though they were sold to *A*, yet he trusted *B* to negotiate and sell them for *A*'s advantage; then *B*'s keeping possession of them was not to give a false credit to him, but for a particular purpose agreed upon at the time of sale.

Upon the same principle, where household furniture, which had been settled (on the marriage of the owner with a ward of the court of chancery, and which settlement was approved by a master) to the use of the owner for life, remainder to his lady for life, remainder to the first and other sons of the marriage in strict settlement, had been taken in execution by a judgment creditor for the debt of the first tenant for life; it was insisted, in support of the validity of the execution, that the settlement itself was a fraud, and the possession by the owner the strongest evidence possible of an intention to deceive creditors. But Lord *Mansfield*, in giving judgment, at the same time that he admitted that the statute of the 13th *Elizabeth* could not be too liberally construed, or be too much extended in suppression of fraud, observed, that such construction was not to

*Cadogan v.
Kennet,
Cowper, 432.*

be made in support of creditors, as would make third persons sufferers. Therefore the statute did not militate against any transaction *bona fide*, and where there was *no imagination of fraud*; and so was the common law. The question therefore in every case was, whether the act done was a *bona fide* transaction, or whether it was a trick and contrivance to defeat creditors. An argument had been drawn from the possession, as a strong circumstance of fraud; but it did not hold in this case, for it was a part of the trust, that the goods should continue in the house.

Atkinson v.
Maling, *et al.*
2 Term Rep.
462.

Again, where *A*, by indenture, bargained and sold a ship at sea, and assigned the grand bill of sale thereof to *B*, for securing the sum of 2000*l.* already advanced by *B* to *A*, and for securing such farther sums as *B* should advance; subject to a *proviso*, on condition therein contained for redemption on payment by *A*, on demand by *B*, of the money then advanced, or which should thereafter be advanced, together with lawful interest. This indenture also contained a covenant, that *A* should, immediately after the execution of it, cause the ship to be insured, and pay the premium, &c. And it was also thereby agreed, that, until default in payment should be made, it should be
lawful

As to this,
vid. 2 Term,
Rep. 594, 595.

lawful for *A* to hold the ship, and take the profits for his own use and benefit. It appeared also, that the grand bill of sale was delivered to *B*, on the execution of the deed. Insurance was afterwards made by *A* on the ship, and a memorandum made on the back of the policy, and signed by all the underwriters, that the ship, having been sold to *B*, the insurers of the policy did thereby consent and agree, that he should be entitled to the insurance, the ship having become his property. *A* having become a bankrupt, a question arose between his assignees and *B*, which of them should be intitled to this property. And, on the behalf of the assignees, it was contended, that this was a fraudulent conveyance, within the statute of the 13th *Elizabeth*; and one ground urged to support that proposition was, that the conveyance was made for the purpose of securing not only the money which was then advanced, but also all subsequent sums which might be advanced; and that it was in the power of the mortgagee, under this security, to continue the possession, and his dealing with the mortgagor down to the time of the bankruptcy. This therefore had a necessary tendency to give a credit, and to defraud creditors who relied on the flourishing appearance of the trader; and an attempt was made to

take this case out of the general principle, respecting the delivery of things at sea; upon the ground, that the delivery of the bill of sale would only be considered as a symbolical delivery of the ship, where it was so intended; but that, in this case, it could not amount to a delivery of the ship itself, because such an implication was expressly rebutted by the terms of the contract, the plaintiff not being entitled to the possession, till after the mortgagor had refused to pay the mortgage money: but it was held, that a delivery of the grand bill of sale was a sufficient transfer of the property to B.

It is observable upon this case, that the question arose between the conditional vendee and the assignees of the vendor under a statute of bankruptcy, who, as we shall see hereafter, are bound by the same equity as affects the bankrupt himself; but I apprehend the case would have been the same, had the dispute arisen between such vendee and a judgment creditor, or any other claimant.

Bamford v.
Baron.
2 Term, Rep.
594.
Note, *et vid.*
ex parte,
Quincy,
1 Atk. 477.

And this point was ultimately settled in the case of *Bamford* and *Baron*. There goods were assigned by the owner to two persons, for the benefit of such of his creditors as would sign a deed of compromise by a certain

41
in time; notice whereof had been published in the county papers. And it was agreed, that the owner should continue in possession for a given time, he accounting for the profits in the mean time to the trustees. He accordingly continued in the visible possession of the goods after the assignment; and the same were taken in execution at the suit of a creditor: and the question was, whether this conveyance was fraudulent, under the circumstances, by virtue of the statute of the 13th *Eliz.* c. 5, and consequently void.

And the opinion of all the judges was *Ibid.* taken, and they were unanimously of opinion, that it was; and they laid down the following as a general principle, *viz.* that unless possession accompanied and followed the deed, it was fraudulent and void. That if there were nothing but the absolute conveyance without the possession, that, in point of law, was fraudulent; not only evidence of fraud, but such a circumstance as *per se* made the transaction fraudulent; but, although the vendor continued in the possession, it was not fraudulent, if the want of immediate possession were consistent with the deed. As
in

Sup.

in the cases of *Bucknal and Roiston*, *Cadogan*, and *Kennet*, and *Haslington and Gill*.

As to the instances, in which the nature of the transaction has been permitted to be made out by parol evidence, they are more rare, but stand nevertheless upon authority not less respectable.

Cole, v.
Davis.
1 L. Raym.
724.

The first instance I meet with is, a resolution in the case of *Cole and Davies*; that if goods belonging to *A*, were seized upon a *fiery facias*, and sold to *B*, *bona fide* upon valuable consideration, though *B* permitted *A* to have the goods in his possession, upon condition that *A* should pay to *B* the money, as he should raise it by sale of the goods; this would not make the execution fraudulent.

Meggott v.
Mills.
L. Raym, 286.

And where a tenant, having changed his trade, from that of a victualler to the trade of an inn-keeper, and, having occasion for more furniture, borrowed money of his landlord, to buy goods to furnish his house; and for security of the money made a sale of the goods to his landlord, but kept the possession of them: it was held by *Holt*, Chief Justice, that, although, if these goods had been assigned to any other creditor, the

keeping the possession of them had made the bill of sale fraudulent as to the other creditors ; yet, since such was the original agreement, and that honestly and really made for securing the money of the landlord, which he had lent to the tenant for this purpose, the agreement was good and honest.

If personal things be fixed to the freehold, they will be considered in law as part of it, while they continue in that state,

Thus, where a brewer, having borrowed money, as a security, conveyed and assigned his dwelling house, and brew-house, and all the copper and utensils in trade belonging thereto, by way of mortgage, subject to redemption, and afterwards continued in possession ; it was held, on a question between the first mortgagee, and the subsequent mortgagees and creditors, as to the validity of the first mortgage, which was disputed upon the ground of its being fraudulent, by reason of the possession being retained by the mortgagor ; that the first mortgagee had a lien upon the utensils fixed, no person having a title to remove them until the mortgage was satisfied. And it was compared to trees on lands leased, which neither the lessor nor any other can cut down during the term leased ;

Ryall v.
Rowles,
1 Atk. 1 Vez.
348.
et vid. ex parte
Quincy,
1 Atk. 477 ;

leased ; because they are considered as part of the lease not excepted thereout. And if it were otherwise, great inconvenience would follow ; as the lessor of a brewhouse, or of any manufactory, with his own fixtures, would be liable to be stripped of them, to satisfy the debts of the lessee.

21 Jac. 24.
c. 19.

We come now to the consideration of the statute of the 21st *James* the first,

That statute, section eleven, the preamble of which section is by mistake connected with the latter part of section ten, and is in these words ; “ for that it often falls out
“ that many persons, before they become
“ bankrupts, do convey their goods to other
“ men upon good consideration, yet still do
“ keep the same, and are reputed the own-
“ ers thereof, and dispose of the same as their
“ own ; enacts that, if at any time thereafter,
“ any person or persons shall become bank-
“ rupt, and at such time as they shall so
“ become bankrupt, shall by consent and
“ permission of *the true owner* and proprie-
“ tary, have in their possession, order, and
“ disposition, any goods or chattels, whereof
“ they shall be reputed owners, and take
“ upon them the sale, alteration, and dispo-
“ sition, as owners ; that, in every such case,

“ the

“ the said commissioners, or the greater part
 “ of them, shall have power to sell and dis-
 “ pose of the same, to and for the benefit of
 “ the creditors, which shall seek relief by
 “ the said commission, as fully as any other
 “ estate of the bankrupt.”

Upon this clause several questions have arisen.

First, whether it applies to conditional conveyances.

Secondly, on the extent of this clause, as to the nature of the things therein comprised.

With regard to the first question, it has been decided, that this statute comprehends mortgages, or conditional dispositions or conveyances of goods and chattels, and that upon the following principles, applicable to the construction of this statute. First, the aim and intent of the legislature was, that an equal distribution of the effects of the bankrupt among his creditors, should be obtained as far as possible. Secondly, that to attain that end, the acts of parliament should be construed beneficially for the general creditors under the commission; therefore it is, in an unusual manner different from
 most

*Vid. Ryall v.
 Rowles.
 1 Vez. 348.*

most acts of parliament, enacted, that all these statutes and laws shall be largely and beneficially construed for the creditors in general, under the commission. Thirdly, it appears the general view and intent of the provision now under consideration, was to prevent traders from gaining a delusive credit by a false appearance of substance, to mislead those who would deal with them. Fourthly, the legislature judged they might do this, by subjecting all the goods of the bankrupt, though conveyed to others, to the general creditors under the commission; because, where the vendee or assignee leaves such goods in possession of the bankrupt as owner, he confides as much in the general credit of the bankrupt as that creditor, who has only taken his bond or note; it is in such case put in the power of the bankrupt, to sell the goods the next day; and the former assignee could only have a personal remedy against the bankrupt. All these grounds hold in case of a mortgage, as well as that of an absolute sale; and a contrary construction would overturn this part of the statute, and restrain it to absolute sales; traders then, instead of absolute sales, would make such mortgages, and there would be greater opportunity, for traders might mortgage over and over again.

The

The principal thing which caused a doubt, as to the applicability of this statute to the cases of conditional sales, arose from the words in the clause, "by consent of the true owner or proprietor;" but it has been held, that they are put in opposition to a false or seeming ownership, and that, therefore, a mortgagee, who, we have seen, is in truth the owner of the property at law, though subject to redemption, may be said to be the true owner and proprietor.

Secondly, as to the extent of this clause, in respect of the nature of the things therein comprised.

In this view of the statute some doubt was entertained, whether *choses in action* were included under the words "goods and chattels."

This doubt was grounded on the legal notion in respect of things in action; that they were not grantable as things in possession; but this reasoning is now exploded, and a bond debt is now clearly held to be a chattel, although some doubt was formerly made as to this, for, that in a grant of all goods and chattels, a bond debt would not pass; but the cause of that was, not because

cause a bond was not in its nature a chattel, but because the question arose on a grant or assignment, or bargain and sale, these not being such goods and chattels as would pass by such assignment or conveyance: but this reasoning does not extend to an act of parliament, which may pass any thing; and, accordingly, it is held that, in an act of parliament, goods and chattels take in *things in action*. And, if goods and chattels comprehend things in action on the construction of any act of parliament, it ought in this; for, otherwise, the owner might assign without notice to others, and so have the order and disposition within the meaning of the clause now in discussion, and yet escape out of the purview of it. And such construction is not only enforced by the first clause of this statute, which directs, that the most beneficial construction for creditors under the commission should be made; but strongly warranted by the clause immediately preceding, relating to bankrupts, who by fraud make themselves accountants to the king, to defeat their private creditors, in which goods, chattels, debts, and other estate of the bankrupt, are expressly mentioned; and which plainly shews, that the words, *goods and chattels*, as used in this act, take in all kinds

kinds of property of the bankrupt, whether in possession or action only.

And it is material here to observe, that there is a striking distinction between the plan of the statute of the 13th of *Eliz.* and the plan of this statute of the 19th of *Jac. I.* there being an express proviso in the former, that it shall not invalidate any transaction which is for a good consideration and *bona fide*; but the latter, supposing the conveyance to be on good consideration, and the party to be an honest creditor or mortgagee, yet not giving him any preference to other creditors, because he has not given notice to the creditors, by having that delivery made to which he was intitled. In such case, therefore, the reputed ownership he thereby gives to the bankrupt, is made, by this statute, the real ownership in him (the bankrupt) for the benefit of his creditors; in which respect the statute operates in the same manner as the registering acts, whereby the person omitting to register, loses the benefit of the conveyance by not giving notice, arising from his own plain neglect. The vendee, whether absolute or conditional, is not, under the statute of *James*, to suffer the vendor, who has made the conveyance, to continue in the possession there described; which direction in this act of parliament is as ne-

Supra.

cessary to be followed as the directions in cases of the registering acts. And accordingly Lord *Cowper*, in delivering his judgment in the case of *Bucknal* and *Roiston*, observed, that, in the case of a bankrupt, such keeping possession after a sale, as was then in question and held valid, would have made the sale void against creditors. Which distinction was affirmed by the judges and chancellor in the case of *Ryall* and *Rowles*.

Supra.

I come now to the second subject under the present head of enquiry, viz. the applicability of the cases, and reasoning upon the retaining possession of personal things after a conditional sale, to the instance of possession retained of the title-deeds after a like sale of real things.

And, in respect to this question, it is material to observe, in the first place, that the statute of the 27th *Eliz. c. 4*, consists of a variety of clauses directed to different purposes, of which the first clause only is material to the point in discussion. This clause provides, "that every conveyance, charge, incumbrance, and limitation, of use or uses of, in, or out of any lands, tenements, or hereditaments, made to defraud any purchaser of the same, in fee, in tail, for life, or years, shall, as against such purchaser only, and every other person lawfully claiming from

from, by, or under him, be utterly void, the said purchaser having obtained the same for money, or some other good consideration."

This clause, in the frame of it, substantially pursues the first clause in the statute of the 13th *Eliz.* c. 5, only ordaining and enacting, that conveyances, made for fraudulent purposes, shall be void in respect of third persons, without pointing out any particular circumstances, which shall be deemed fraudulent. Therefore, under this statute, as under the other, the question of what shall be fraudulent or not, within this clause, is left to construction of law upon the facts.

By construction of law on the 13th of *Eliz.* we have seen, that the retaining possession of personal things, contrary to the *import* of a written contract, by which the interest therein is parted with, absolutely or conditionally, is fraudulent.—Why?—Because, the subsisting contract and the appearance are at variance; the greatest badge of ownership, the possession, being there where the substance is not to be found. The retaining of title-deeds, after a conditional sale or mortgage of the estates to which they relate, has the same effect.

The title-deeds are as to real things, what the possession is as to personal things; and no man can, by the utmost prudence, defend himself from imposition in real contracts, unless he is secure in taking the title-deeds; then the mischief assimilates; so by analogy ought the legal conclusion. We are to recollect, that, in the cases of personal property, the foundation upon which the prior contract is void, is not upon the ground that, as between the parties, delivery of possession is of the essence of the contract; if that were the ground, the principle would not apply to real estates, because the contract respecting them is effected by the operation of the statute of uses, which changes the ownership by a transfer of the possession in law, without any actual change of possession; but the principle being independant of the form of contracting, and applying merely to the effect of a contract, where this circumstance is neglected or omitted, on third persons, it is simply a question, as to the avoidance of a contract formal and valid, as between the parties, though vicious and fraudulent as to third persons.

2 Bulst. 225.

The case of *Stone and Grubham*, though arising upon a lease, contains some observations of Sir *Edw. Coke*, which appear, to me, to go a great way in support of the proposition,

tion, *that to suffer deeds to be retained in such cases is fraudulent.*

In that case one had made a gift of all goods and chattels, real and personal, remaining and being about his capital messuage, or elsewhere, within the realm of *England*; and a lease for a year (part of the grantor's property) having been held to pass by these words, it was then moved, that notwithstanding this gift so made, yet the owner still continued the possession, and so it was fraudulent. And, as to this, *Coke* said, if a man do mortgage his land, and yet still continues his possession, no disseisin is wrought by this; if it were an absolute conveyance, and a continuance in possession afterwards, this should be adjudged, in law, to be fraudulent, for this hath the face of fraud; but otherwise it is, as it is here, in this case, where the conveyance was only conditional, as upon payment of money, there the interest does not pass absolutely, but upon a future condition; for the gift was before upon condition of the payment of such a sum by the owner. As to the fraud, *dolus versatur in universalibus*; but when the conveyance is conditional, continuance in possession after this shall not, in the judgment of the law, be said to be fraudulent, and this is very clear; and the whole court agreed therein. It was then demanded (by

Stone 21.
Grubham.
2 Bull. 225.

reason of an objection made) in whose custody the lease was, after the gift? It was answered, and so proved, that the same was always after in the custody of him to whom the gift was made: COKE. *If the same had afterwards continued in the custody of him who made the gift, it would have been clearly fraudulent.*

It is remarkable, upon this case, that Coke, when speaking upon such circumstances as are fraudulent in the above cases, makes his observations, indiscriminately, upon a mortgage of land, and a mortgage of a lease; and as his observations upon an absolute or conditional sale of lands are applicable to a lease, so seem his observations upon retaining a lease, after a mortgage, to be, to the retaining the title-deeds to freehold lands after a sale. A term for years is held by a lease, a fee simple is held by the title deeds. The possession of the deeds is, in both cases, the evidence of the title. The *suffering* the retention of the title-deeds in both cases, when the ownership is incumbered or charged, enables the hanging out false colours; it, therefore, is fraudulent in respect of those who are drawn in by false appearances.

But

But there is one striking distinction between the case of goods, and that of title-deeds, left in possession of the owner, after an absolute or conditional sale; arising from the circumstance, that in the former case such possession can never be retained, but with the knowledge of the vendee; whereas in the latter case many instances may occur, in which there may be every reason for the vendee to presume, that the title-deeds were not in the possession of the vendor. This circumstance will necessarily induce an exception of all such cases (amongst others) in which the person from whom an estate moves is to be presumed, from the nature of his interest, not to possess the title-deeds to the estate out of which his interest arises.

Therefore, if the mortgage be of a reversion, there is no reason to postpone the mortgage upon the mere abstract fact of his not having required or procured the title-deeds and writings; because in such cases, the title-deeds and writings do not properly belong to the reversioner, nor has he, generally speaking, any means by which he can procure them, if refused by the tenant for life, or possessor of the particular estate.

Tourle v.
Rand.

2 Brown Rep.
chan. 650.

This question was agitated in equity, before Lord *Thurlow*, in the case of *Tourle* against *Rand*, which was as follows. *R* being, as supposed, entitled under the will of his father to a remainder in fee (but in fact only to a remainder intail) *expectant on the death of his mother*, in certain freehold estates, conveyed his reversion and remainder, *expectant on the death of his mother*, to *A* in fee, by way of mortgage. At the time of making the mortgage, the deeds and writings were in the hands of a collateral relation, but *A*'s attorney was informed by the mortgagor, that they were in the possession of the mother, who would not consent to part with them, she being then in possession of the estate as tenant for life, which she continued until the time of her death. Immediately after her decease, *A*'s attorney applied to *R*, for the possession of the title-deeds, to which *R*'s general answer was, that he would send them in a day or two, or to that effect. Shortly afterwards, *R*, being then tenant in tail in possession (but supposing himself tenant in fee of the above estate, and being also possessed of a leasehold estate) mortgaged both estates to *T*. At the time when the latter mortgage was made, all the title-deeds, relating to the estates, were delivered to *T*'s attorney, and continued in *T*'s possession.

Some time afterwards, *T* filed his bill to foreclose the mortgaged premises, and among other things, charged that *A* ought not to have permitted the title-deeds and writings to have remained in the hands of *R*, that he left them in his hands for the purpose of enabling him to raise more money on the security of the premises, and that the same was a fraud on *T*, and that therefore *A* ought to be compelled to redeem *T*'s mortgage, or ought to be debarred of any interest, which he might have in the premises, till *T*'s mortgage should be satisfied. It was contended on the part of *T*, that, where a prior mortgagee leaves the title-deeds in the possession of the mortgagor, it is a fraud upon the second mortgagee, as he is induced, by the title appearing on the deeds, to lend his money; that the second mortgagee therefore having the deeds should be preferred. But Lord *Thurlow*, Chan. said, that he did not conceive that a first mortgagee, not taking the deeds, was *alone* sufficient to postpone him; if it were so, there could be no such thing as a mortgage of a reversion. *In that case*, the deed being in the hands of tenant for life, is not sufficient to turn him round. The first cases where the prior mortgage was postponed, were cases of fraud, then the same was done in cases of gross negligence. Here was no
laches,

laches; the mortgagee could not compel the tenant for life to give up the deeds: though a dowress, upon a confirmation of her title, might be compelled, the tenant for life could not, although, after her decease, he might have filed a bill. But that was not sufficient to charge the mortgagee.

The reasoning of Lord *Thurlow* on this case, appears to me to be equally applicable to any objection to a mortgage so circumstanced, founded upon the statute, the effect of which we are now discussing.

Vid. 1 Term,
Rep. 755.

I have not met with any case, in which the abstract question, whether the circumstance of *suffering* the mortgagor to retain the title-deeds is fraudulent under the statute of the 27th *Eliz.* has been agitated either in a court of law, or a court of equity; but in the case of *Goodtitle* against *Morgan*, Mr. Justice *Buller* considers it "as an established rule, in a court of equity, that a second mortgagee who has the title-deeds, without notice of any prior incumbrance, shall be preferred; because, if a mortgagee lends money upon mortgage, without taking the title-deeds, he enables the mortgagor to commit a fraud. If this has become a rule of property in a court of equity (says the

learned

learned Judge) it ought to be adopted in a court of law."

But unless the proposition, that suffering the title-deeds to be retained by a mortgagor, where he has such an estate as entitles him to hold them, is fraudulent, can be supported upon the principle that it is so at law, on the fair construction of the 27th *Eliz.* it appears, not to be tenable upon the ground of transferring the notions of courts of equity on that subject to courts of law; because, all the cases upon that subject, which I have yet been able to meet with in courts of equity, seem, to me, to stand upon other ground, namely, that of fraud, express or implied, which has brought them within the peculiar jurisdiction of those courts. They have been either cases of combination; as, if a man makes a mortgage, and afterwards mortgages the same estate to another, and the first mortgagee is in a combination to induce the second mortgagee to lend his money; or they have been cases of imposition; as, where a first mortgagee has stood by and seen another lending money on the same estate, without giving him notice of his first mortgage.—These are cases of fraud, which will indisputably occasion the parties engaged therein, to lose their priority in equity; but those

courts

courts appear not to have gone, as yet, any farther.

But, although the cases hitherto decided in equity, appear to me not to warrant the position in the extent put by Mr. Justice *Buller*, in the last-mentioned case, yet, several of them go far enough to shew, that courts of equity have thrown the *onus* on the neglectful person, and obliged him to account for his not having the possession of the deeds, and to discharge himself from the imputation of fraud from that circumstance. In the case of *Head and Egerton*, *S* made a mortgage of lands to *H*, who, placing a great confidence in him, lent the money, taking his word that he would deliver him the title-deeds, the mortgage being executed in *London*, and he pretending the title-deeds were in the country. Afterwards, *S* borrowed 2000*l.* of *E*, on a mortgage of the same lands, at the same time producing and delivering to him all his title-deeds, which were perused, and approved by his counsel. Then *H* exhibited a bill to fore-close *E*, and to compel him to discover the title-deeds relating to the premises, and to have them delivered up to him, insisting upon them, as owner of the land. *E* pleaded the mortgage made to him, and that he had no notice of the

Head v.
Egerton.
3 P. Will. 280

the prior mortgage to *H*, and insisted, that the court ought not to aid *H*, and take the title-deeds from him, without ordering him to be paid his mortgage-money; and so it was decreed by the Chancellor. Now, although in this case, *H* had been, in some measure, accessory in drawing in *E* to lend his money, by permitting *S*, the mortgagor, to keep the title-deeds in his possession, the delivery of which *H* ought to have insisted upon when he took the mortgage, yet, it clearly appeared, that the deeds were not retained fraudulently; for there was a cause assigned, namely, that they were then in the country, and the mortgagor stipulated that they should be delivered.

Again, in the case of *Peter and Russell*, where *A* being assignee of the mortgage of a leasehold estate belonging to *G*, and having the lease in his custody, *G* afterwards proposed to borrow a farther sum of *B*, on a mortgage of part of the same estate; and the attorney for *B* desiring to see the original lease, *G* told him, that he had it not by him, but, that his lawyer kept all his writings for him, as not thinking it safe to keep them in his own house, where all sorts of company resorted. Then *G* applied to *A*, telling him, that he was about agreeing with a person for re-building part of the premises,

Peter v.
Russell.
1 Eq. Ca. Abr.
321.
Gill Ep. Rep.
122.
2 Vern. 276.

premises, at so much a foot square, which would better his security, and desired him to let him have the original lease, that he might see the dimensions of the house: *A* would not trust *G* with the lease in his own power, but went home with him, and, after he had been there some time, *G* sent for *B* and his attorney, telling them, he had now the original lease, which they might see; and upon their coming to his house, *G* went into the room where *A* was, and desired him to let him have the lease, to shew the person he had mentioned, for that he was now in the house. Accordingly, *A* let him have the lease, which he carried to *B*, who, being satisfied therewith, lent him the money, and took a mortgage of part of the premises, insisting at the same time to have the principal lease delivered to him. But *G* urging, that it concerned much more than what *B* had in mortgage, said, he could not part with it. *B* permitted him to keep it, and he, thereupon, in an hour's time, delivered it again to *A*, without acquainting him with what he had done; and *A* swore expressly, in his answer, that he had no notice of this transaction, or of *B*'s mortgage. Afterwards *B* lent *G* a farther sum of money, and he prevailed on *A* to let him have the lease a second time; but
A did

A did not know the occasion for it. Then *G* failed, and *A* brought his ejectment and recovered; after which, a bill was filed by *B* to have *A*'s mortgage postponed, upon the ground, that it was a manifest fraud in *G*, and that *A* was privy to it. But this was denied, because there was no manner of proof, that *A* knew any thing of *B*'s lending this money, and if there had, yet *B* appeared guilty of so much a grosser neglect, that he ought not to prevail; for *A* intrusted *G* with his original lease but for a very little while; but *B* took his word, that he could not part with it, and left it wholly in his power to go on in defrauding whom else he chose: Besides, it appeared, that *A* was imposed upon by *G*; for he parted with the lease only to better his own security, and had the most specious pretence that could be for it; and, therefore, it could not, without manifest proof, be objected to him, that he let *G* have his lease to shew *B*, or with a design to draw in *B* to lend his money.

But although a court of equity has not authority, on the ground of its own *peculiar jurisdiction*, to postpone a mortgagee on the mere fact of the mortgagee's accepting the mortgage, without calling for the title-deeds,

or

or being satisfied with a reasonable excuse for their non-production, where all other circumstances stand indifferent, and the legal estate is vested in such mortgagee by force of the instrument of conveyance; because, in such case, there wants equitable facts, on which such court may found a jurisdiction, without the existence of which circumstances, the legal maxim that *aequitas sequitur legem* predominates, yet wherever the claimants stand upon equitable foundations only, there the bare circumstances of the one claimant having neglected to take in the title-deeds, and of the other having used that precaution, and possessing them, are sufficient to give him a superior equity, by reason of his specific *lien*, all other things being equal: which shews, that, in the former case, courts of equity have withheld their arm, not because the principles upon which they act, having jurisdiction, would not go all the length required, but because they were deficient in point of jurisdiction; the abstract fact of the mortgagee not taking the title-deeds, not furnishing ground to impute to him fraud, deceit, or such gross negligence, as furnishes an inference of fraud, in the absence of which such courts are incapable of acting.

The case of *Stanhope* and the Earl of *Verney*, before Lord *Northington* in chan. July 27, 1761, appears to me to warrant the above observations. The case there was, that *S* being seised in fee of certain estates, subject to an outstanding term of years in *R* and *E*, by indenture of lease and release, dated the 4th and 5th days of *June* 1732, conveyed them to *D* and her heirs, for securing the payment of 1000 *l.* and interest, and covenanted to produce the deeds respecting the terms for years. Afterwards *R* and *E* assigned the term to other trustees, in trust for *S*, his heirs and assigns; and then *S*, by indenture, dated the 19th of *December*, 1732, conveyed the same estates to *N*, by way of mortgage, for securing to her 3000 *l.* and interest, with a declaration that the trustees of the term should stand possessed of the term in trust for her, and the deeds respecting it were delivered to her, and neither she nor the trustees had notice of the mortgage to *D*. Afterwards *D* brought an ejectment; *V*, who claimed under *N*, defended it, and set up the term with a declaration of the trust of it in favour of *N*; upon this, *D* brought her bill equity. The question was, which should be preferred? *D*, who had the first declaration of the trust of the term, or *V*, who had the *subsequent* declaration of

Stanhope v.
Verney.
vid. Co. Lit.
last edit.
293. b.
in note.

(a) That is
in equity.

the trust, but had the custody of the deed. Lord *Northington* held, that a declaration of trust in favor of an incumbrancer, was tantamount to an actual assignment, unless a *subsequent* incumbrancer, *bona fide*, and without notice, procured an assignment; and that the custody of the deeds respecting the term, with a declaration of the trust of it, in favor of a second incumbrancer, was *equivalent* (a) to an actual assignment; and *therefore* gave him an advantage over the first incumbrancer, which equity would not take from him.

Upon the whole, therefore, the question seems still open upon the construction of the statute of the 27th *Elizabeth*, whether, under that statute, suffering the title-deeds to be retained, contrary to the import of the deed of contract, where the same cannot be accounted for on good grounds, is not fraudulent as to purchasers; and the procedure of courts of equity on cases of that sort seems favourable to this construction against the title of the first mortgagee so circumstanced.

C A P. III.

Of what is necessary to constitute a
Mortgage of Lands, &c.

TO constitute a valid mortgage, there must be a mortgagor, who must be a person capable of granting, conveying, or assigning the land or thing mortgaged, and not disabled by any legal or natural impediment. A mortgagee, who must be a person capable of a grant, conveyance, or assignment to him, and not disabled to receive the lands or things grantable or assignable: And a thing mortgaged, which must be granted or assigned in that order and manner which the law requires.

C A P. IV.

Of the Mortgagor.

AS to the mortgagor, it may be observed, that whoever is disabled by the common law to take land, is also disabled to make a mortgage of it; and also many persons, who have capacity to take lands, have no ability to mortgage them; as men attainted of treason, felony, or in a *præmunire*, aliens born, ideots, madmen, men blind, deaf, and dumb, from their nativity, *femes covert*s, infants, men under *duress*e, &c. for conveyances made by persons under these disabilities may be avoided.

But every person who has an estate in fee-simple in lands, tenements, or hereditaments, whether the same be legal or equitable, not affected with any incapacities above alluded to, may be a mortgagor, and may pledge such estate, to the utmost extent of that interest.

And

And some persons also, who have but a qualified interest in lands, tenements, or hereditaments, may be mortgagors—as tenants in tail, for life, for long terms, or the like.

And if tenant in tail mortgage lands, the court of chancery will ultimately compel him to suffer a recovery, that being necessarily incidental to his making a good title.

But where the mortgagee brought his bill against the mortgagor to compel him, as tenant in tail, to make a good title by suffering a recovery, it was said that the court of chancery would not point out what title the mortgagor should make, but would decree him to make such title to the mortgagee, as he was capable of doing; and accordingly, that court directed a good title to be made by the defendant to the plaintiff.

Sutton v.
Stone,
2 Atk. 101.

And, in some instances, persons who have no interest in lands mortgaged, may become mortgagors, by virtue of a power or the like.

And of persons who may be mortgagors, although they have no interest in the land, &c. mortgaged, some are invested with that

F 3 capacity,

capacity, by express authority from those through whom they derive such power; others receive that capacity, as involved in other capacities of a more enlarged and efficient nature; and others, again, are clothed with that capacity by inference of law or equity, resulting from the evident intention, that such capacity should be annexed to the character of the person invested with such power, the object for which such interest was conferred, not being attainable without that power being implied.

Trustees, empowered expressly by virtue of settlements, deeds of trust for discharging of debts, and the like, to raise money by mortgage, fall under the first class of mortgagors last mentioned.

Under the second class of mortgagors, last alluded to, those persons are included, who are invested with the powers of sale, for the purpose of raising money for payment of portions, debts, &c. For a power to sell *for such purposes*, implies a power to mortgage, which is a conditional sale.

Mills v. Banks
3 P. Will. 1.
1 Chan. Ca.
176.
Pre. Chan.
395, 396.

The third class above-mentioned, comprehends trustees upon trust to raise money out of the *rents* and *profits* of lands for
merito-

meritorious purposes, or within a limited time. Such persons, when so intrusted, unless there be words to restrain the meaning of the terms *rents* and *profits*, and confine them to the receipts of rents and profits as they accrue (as if the trust be expressly to pay debts and legacies or portions, out of the annual rents and profits) are, on an equitable construction of the settlements by which they are constituted trustees, considered by the liberal construction of these words (the lands, and profits of the land, being the same thing at law) as invested thereby with a power of raising it by anticipation, as by selling, and consequently mortgaging; these being the only means by which the trusts, they were constituted to perform, can be effectively fulfilled. This, therefore, is a construction, made in order to effectuate, substantially, the end and intention of the parties, which intention ought always to guide us in expounding instruments constituting trusts. As in the case of a devise of lands to trustees on trust, out of the rents and profits to pay debts and legacies, which, in the case of a will, authorises the trustees to sell, and consequently to mortgage the land itself; or in the case of a trust created to pay portions out of rents and profits of an estate at *prefixed days*, and within a period, during

F 4

which

Vid. *Okeden v. Okeden.*
1 Atk. 550.

Co. Litt. 46.

Lingon v. Foley.
2 Chan. Ca.
205.
1 Vern. 104.

Backhouse v. Middleton.
1 Chan. Ca.
72.

which the same cannot be raised out of the annual profits, which also implies a power of sale or mortgage within the intention of the trust. A trustee, therefore, in either of these predicaments, may be a mortgagor; for though the strict and natural meaning of the word *profits*, as opposed to land, is *annual profits*, yet, in a more enlarged sense, and in order to prevent an inconvenience, it is now taken in such cases to include every mode by which land may be made to yield profits, out of which, money so charged upon it may be taken, and, consequently, to include sale or mortgage. And this construction has prevailed ever since the time when lord *Somers* presided in chancery.

Here two points obviously offer themselves for our consideration.

First, in what cases money, charged on lands for such purposes as are above alluded to, may be raised by mortgage.

Secondly, at what time such money may be raised.

First, no *express* mention need be made of a specific time, to bring a case within this rule of construction, as it is sufficient
if

if enough be said to furnish the court with a reasonable ground, to suggest the period which must have been intended.

Thus, in the case of *Trafford and Ashton*,
 the trust of a term for 99 years, limited
 after an estate for life to husband and wife
 in a settlement, was declared to be, that,
 if *A.* the tenant for life, should die without
 issue male, and should leave one or more
 daughters, then, the trustees should, *out of*
the rents and profits, raise 8000*l.* for the
 daughters of that marriage, as soon as *con-*
veniently might be, without limiting any ex-
 press time when the portions were payable;
 and a farther trust of the term was declared,
 that, if there should be a son and a daugh-
 ter, or daughters, by the marriage, in such
 case, the trustees should, as soon as pos-
 sible, raise 1000*l.* a piece for the daughters,
 payable at 21 or marriage. This term of
 99 years was not made without impeach-
 ment of waste. Husband and wife were
 both dead, and one question was, whether
 this 8000*l.* should be raised otherwise than
 out of the yearly rents and profits. And,
 it was held, that it should be raised by sale
 or mortgage. And the principal reason
 was, because the words *profits of lands*, es-
 pecially when to pay debts or portions, im-
 plied

Trafford v.
Ashton.
 1 P. Will.
 416.

plied any profits that the land would yield either by selling or mortgaging. And it was said, that *here* was a certain time named for payment of the portions, and that implied, though not expressed, viz. they were to be paid *as soon as conveniently might be*; now, that was presently, for the daughter being twenty one, at the death of tenant for life, and marriageable, it was then convenient. And it was decreed, that the portions should be raised by sale or *mortgage*, as should be agreed by the master and the parties.

1 Atk. 550.
2 P. Will. 669.
2 Vern. 72.
669.

And, although the authorities on this head of equity, confine this implication of a power to raise profits by anticipation on mortgages, to cases where some particular time is mentioned or alluded to (as in the last case) for the payment, at which period the profits, if taken as they ordinarily accrue, will not effect the purposes of the trust; and certainly courts have laid great stress upon that circumstance, as authorising them to enlarge the power of the trustees; yet the principle, it seems to me, may be extended farther, viz. to all cases where the intention of the parties and purpose to be effected, cannot be brought about within a reasonable time, unless by such anticipation.

Thus

Thus, in the case of *Stanhope and Thacker*, Stanhope v. Thacker. Pre Chan. 435. where lands were conveyed in settlement to trustees and their heirs, to the use of *A* for life, then to *B* for life, remainder to *C*, their son, for 99 years, remainder to his intended wife for her jointure, remainder to the first and other sons of the marriage in tail male successively, remainder to the daughter and daughters of that marriage, and the heirs of their bodies, till they should, out of the rents, issues, and profits of the same premises, have raised and received the sum of 3000*l.* with remainder over after the said sum raised. The court having determined, that the limitation to the daughters, was but a security till that money was raised, held that the 3000*l.* being to be raised out of the *rents, issues, and profits*, if the ordinary or annual rents and profits of the lands would not raise the money in a convenient time *to answer the intent of the settlement*, which was to provide portions for the daughters, the same might be decreed in a court of equity to be raised by a sale or mortgage thereof, which were the extraordinary profits of the same lands; for, otherwise, if the daughters should be confined to raise the 3000*l.* out of the annual rents and profits only, they would be eating out their portions, and might never have

have any sum adequate for the provision intended for them.

Earl of Bath v.
Bradford,
2 Vez. 587.

And a trust created by will for payment of debts, whether they be simple contract, or specialty (for as to the trust both are on a footing, though there be no term created for that purpose) gives, in a court of equity, incidentally, authority to make a mortgage or sale; because, the estate, by virtue of such devise, becomes a trust, and such court having jurisdiction to liquidate it, after liquidation can give interest for the debt.

Then the debt, being a gross sum with the interest, becomes an incumbrance, and a mortgage may be made to pay it off; and in such case, the creditors, if not paid, can have no relief but by application to a court of equity, because they can have no action against the heir, or against him and the devisee; and then, when all or any of the creditors join in, or bring a bill for satisfaction of their debts, and to have a performance of the trust by sale or mortgage, from the moment the mortgage is made, that also it is clear, carries interest.

And as the court of chancery will, upon bills brought by creditors, decree money to be

be raised by mortgage or sale, so they will support trustees, who mortgage without such decree first had, *if it be fairly done*; for the trustees need not wait for a decree of the court, which, if it were necessary, would oblige every person to come there, but they may do it without: And this is plain, if we consider the nature of a decree of that court, for such decree does not *create* or *give* a right, but only enforces an execution of a trust and power *before subsisting*.

And, in such cases, equity acts by analogy; for, if a bond creditor bring an action against the heir at law, or against him and the devisee jointly, and (since the statute of fraudulent devises) if the heir, in case of descent, or heir and devisee joining in case of a devise, come in and confess real assets (which in justice they ought to do) in that case judgment goes against them for the debt, to be levied out of the estate; but, because it cannot be known how much the value of the land descended or devised is *per annum*, there issues a writ of enquiry to the sheriff, and the judgment proceeds, that the sheriff shall deliver the lands to the plaintiff *donec debitum predictum levaverit*; then the sheriff makes

makes an enquiry in nature of an extent, fixes the extended value, which is always much *below* the real value of the lands, and delivers them to the plaintiff, according to that value. The remedy that the heir and devisee have, is by *scire facias*, to have an account and the lands delivered back. But a court of law will do that only according to the extended value by the sheriff; therefore, the heir and devisee must come to a court of equity, to have it extended according to the real value, and to have it back afterwards: But the court will insert terms, namely, upon paying interest; for a court of equity will not extend its power to assist the heir at law or devisee, but according to equity, by making him answer satisfaction and do justice.

Green v.
Belcher.
1 Atk. 505.

The declaring an estate "to be chargeable, and to stand charged with the raising a sum of money for the benefit of children unprovided for, in such manner and in such proportions, as the survivor of the father or mother should appoint," would not only include a power of raising the money by mortgage or sale, but a certain determinate time for raising it.

And

And portions may be raised by mortgage, whenever, by construction of law, they become payable; for, from that time they bear interest, but not before, unless there be a special provision to that effect on limiting them; because, portions do not carry interest as due thereon by virtue of their own *intrinsic* nature, but in respect of forbearance of payment, as in case of any other liquidated sum due.

But, wherever a trust of a term for raising portions prescribes a particular method for raising them, it implies a negative, that they shall not be raised in any other way: as if it authorises the trustee to raise and pay out of the rents and profits of the estates charged, as well by leases for one, two, or three lives, or for any number of years determinable thereon, as for twenty one years absolute at the old rent, a certain sum for daughters portions; for, in such case, it is as much the intent of the settlement, to confine the manner of raising the portion to leasing, as to secure any portion at all, and, consequently, it would be a plain breach of trust to raise it any other way.

Ivy v. Gilbert.
2 P. Will. 14.
Pre Chan. 583.
Evelyn v. Evelyn.
2 P. Will. 666.
Mills v. Banks.
3. P. Will.
6. 8.

And

And, in such cases, where the words and intent of the parties are plain, no arguments from the inconveniences that may result to the objects of the settlement, from the prescribed mode of raising the money, are of force; because, the same settlement, which orders the payment of portions at eighteen or twenty, or, as soon after as the same can be raised by the means pointed out, might order the payment thereof at forty years old; the same settlement, which provides a large sum, might have provided a small sum; but the parties would have had no right to complain, or, if they did, could not be relieved. In these cases, the deed must determine for itself. It might as well be contended that, in such cases, the trustee might make a lease, for four lives, or for years determinable upon the death of four lives, or, that they might make a lease for years reserving less than the old rent, as to say, that under such a trust, they might make a mortgage or sale of the term.

Lingard v.
Earl of Derby.
1. Brown,
Chan. Rep.
312.

And, the same observation is applicable to a devise for payment of debts; for, by the words and construction of the statute of devises, the devising an estate for payment of debts, takes the case out of the statute, and then the debt, standing as it would have done

done before that statute was made, the creditor can come upon the real estate only in such manner *as the will directs*. Therefore, where one devised his estates to trustees, in trust to pay the yearly rents and profits, in discharge of his wife's jointure and his sister's annuity, and in payment of such of his debts and the interest thereof, as his personal estate should fall short of satisfying, and, subject thereto, to pay his brother an annuity of one hundred pounds *per annum*, to continue till after his debts, affecting his lands, should be paid off by the rents and profits of his estate, and, immediately after the payment of his debts, then two hundred pounds *per annum*, in lieu of the one hundred pounds, and an additional annuity of fifty pounds to his sister; and, as to the residue of the rents and profits, gave them over; it was held, that there could be no sale or mortgage, it being the clear intent of the testator, that no part of the land should be alienated for the payment of debts.

And the law would be the same, if there were ground; from whence it necessarily must be inferred, that portions were meant to be raised by perception of profits: As if the leasing power for raising portions were restrained, "so as such lease or leases shall

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cease

Evelyn v.
Evelyn.
2 P. Will.
659.

cease and determine, when the money shall be raised;" for, such a clause furnishes the strongest argument imaginable, that the seller did not intend a sale of the premises for the raising of those portions, but only to do it by preception of profits, when, even a lease thereof was not to continue after the portions raised, which could not be, if, after those sums were raised, and the children paid off, the term was still to subsist for a purchaser or mortgagee; it would not be possible that the term could cease, on raising the portions, in any other sense or way, than by raising them out of the growing profits.

However, the value of the estate, and the length of time it would take to raise a sum charged, coupled with the object, might possibly, in some instances, be material, notwithstanding the mode was limited in express terms.

Ivy v. Gilbert.
2 P. Will. 20,
21.

But, where a mortgagee had lent money upon an assignment of a term so circumstanced, and had suffered the mortgagor to continue in possession, and to receive the rents and profits, under the clause in the mortgage-deed, that it should be lawful for the mortgagor, to take the profits without account until default of payment, so that he,

he, by that clause, was in the nature of a tenant at will to the mortgagee; it was held that so much of the profits, as the mortgagor had received, must go towards the payment and sinking of the portions, and that the mortgagee must resort to the mortgagor or his representatives for the mortgage-money and interest; but, as there was a power of leasing, the master was directed to see how far the land might have been charged by leasing, and whether any lands were vacant; and the court reserved the consideration, how far the estate should be thereby chargeable.

But, if a man has power to charge with any sum not exceeding a specific sum mentioned, he may raise the same by mortgage; for, he may, notwithstanding, charge it with the given sum and interest besides; because, the intention, in such case, is to charge the premises with the principal money, and that, of course, carries interest, for nobody would lend the sum charged on such security, if the law were otherwise.

Lord Kilmury
v. Geery.
2. Salk 538.
Eq. Ca. Abr.
341.
Earl of Bath
v. Earl of
Bradford.
2 Vez. 586.
Evelyn v. Evelyn.
2 P. Will. 591.
As applied
2 Atk. 359.

Persons authorised to raise money upon land by virtue of powers, will not be considered as having acted in execution of such power, unless it be so stated in the mort-

gage-deed, or be a necessary inference from the *res gestæ* between the parties; nor will a court of equity relieve the mortgagee, if this be neglected.

Jenkins v.
Kemys.
1 Lev. 150.
S. L. Hard.
305.
1 Chan. Ca.
103.

Therefore, where there was tenant for life, remainder in tail, remainder over, under a settlement, with power to tenant for life by deed in writing, to charge the estates in settlement with 2000*l.* and the tenant for life, and the remainder man in tail, without reciting the power, conveyed the lands in fee by way of mortgage; it was held in chancery, that the tenant in tail, joining with the tenant for life in the conveyance, and not reciting the power, it could not be taken to be a conveyance in execution of the power, but as owner.

Secondly, as to the time at which money, provided for portions, may be raised by mortgage or sale.

All questions as to the time at which portions shall be raised, ultimately resolve themselves into mere inquiries into the intention of the parties, from whom they are derived, at the time of their being provided; and they ought always to be presumed to have been intended to be raised at that period,

riod, when the receipt of them will be most beneficial to those for whom they are provided, unless it be shewn that the parties meant otherwise. Upon this principle it is a rule, with respect to contingent terms for raising portions, that, whenever all that is *contingent*, annexed to such terms, has happened, the term shall be considered as commencing, in the nature of a remainder expectant upon the estate for life, which precedes it; and, therefore, a father is taken as dead without issue, whenever the wife is dead by whom he is to have issue; (a) the failure of issue male between the parties is tantamount to the decease of the father without issue male of the body of his wife. The term is then considered as vesting in interest, though not to take effect in point of profits until after the death of the father; for, that he must die is certain, though the time when is uncertain; and if the time mentioned for the vesting and payment is come (viz. twenty-one, or marriage, &c.) the

(a) The term vests in interest or arises in equity immediately when, whether it shall arise or not, ceases to be contingent, and, therefore, in this respect, the distinction taken by lord Parker between the cases Butler and Duncombe, and Saville and Saville, on the ground of all the profits being disposed of, seems of no consequence. See Stainforth and Stainforth, 3 Chan. Rep. 201.

3 Chan. Rep.
819.

term may be mortgaged or sold, though in remainder and not in possession; for then is the *equitable* commencement of the term.

Graves v.
Mallison.
Sir T. Jones,
201.
Eq. Ca. Abr.
336.
East. 34. Car.
2.
N. B. No ob-
jection be-
cause out of
rents and
profits.

One of the earliest cases we meet with of this description, is that of *Graves and Mallison*, which was determined at common law: There, *A* made a settlement to the use of himself for life, remainder to the use of his first son in tail male, remainder to trustees for forty years, remainder to himself in fee. The term was declared to be a trust, that, in case it should happen that the said *A* should *die without issue male of his body*, BEGOTTEN ON HIS WIFE, then the trustees should raise certain given sums for daughters portions, payable at the age of twenty-one or marriage, with a provision for maintenance in the mean time. The wife died, leaving two daughters and no issue male. And it was resolved by Lord Chief Justice *Pemberton*, and *Dolben* and *Raymond*, Justices, that the right to the portions was vested by the mother's death without issue male in the life of the father; for, otherwise, the father might live so long, that they might be of little service; and, that the trustees, after the death of the mother and in the life of the father, might sell their interest in the term (although it could not take effect in possession

possession in them, or their vendee during the life of the father) to raise maintenance, or for payment of the portions, if any of the daughters attained the age of twenty-one, or were married in his life-time.

And in the case of *Gerard and Gerard*, where *A*, upon his marriage with *B*, settled an estate to the use of himself for life, and then to his lady for life, and so to his first and other sons in tail, and if he should die without issue male, having one or more daughters, then to the use of trustees for five hundred years, upon trust to raise 5000*l.* for such daughter, if but one, at her age of twenty-one years, or day of marriage, which should first happen after the decease of the said *A* and *B*, or within six months after either of those days or times, so as, that, if such marriage was had in the life-time of her parents or grand parents, the same should be had with their consent. *A*, the father, died, the daughter having attained the age of twenty-one in his life-time, and the mother him surviving; and, on a bill preferred by the daughter to have her portion raised, it was so decreed, that, upon the whole of the deed, appearing to be the intent: for, it was said, that although the first clause for payment of the portions, had it stood single,

Gerard v. Gerard.
2 Freem. 271.
2 Vern. 458.
Hill. 1703.
Approved by Lord Cowper in Corbett and Maidwell.
3 Chan. Rep. 203.
Vid. *Stainforth v. Stainforth*, 2 Vern. 460.
S. L. and Sandys v. Sandys, 2 P. Will. 707.

had been pretty plain, that it could not have been paid till after the decease of the father and mother, yet, by the subsequent words, it seemed to be intended that it should have been paid in their life-time upon marriage, in case such marriage was had with consent; and, therefore, the words after the death of the father and mother were rejected, in order to raise the portion, at the time when, for the conveniency, and to promote a proper match for the daughters in marriage, which is the natural and true use of it, the same ought to be raised.

Staniforth v.
Staniforth.
2 Vern. 460.
vid. Sandys v.
Sandys.
2 P. Will. 707.

In the case of *Staniforth* and *Staniforth*, decreed at *Powis-House*, by the Master of the Rolls in the third of Queen *Anne*; lands were settled, on the marriage of *S* with *C*, to the use of *S* for life, remainder to the heirs male of *S* and *C*, and if it should happen that the said *S* and *C* departed this life leaving no issue male, then to trustees for two hundred years from the decease of the survivor of the said *S* and *C*, for raising portions for daughters. *S* died without issue male, leaving a daughter; and on a question, when the portion should be raised and paid, the Court of Chancery decreed, it should be raised and paid in the life-time of *C* (whose jointure covered the estate) with interest

interest from filing the bill, and *that* though there was no express time limited for payment thereof, and consequently it might be intended to be payable, only from the death of the survivor.

Lord *Camden*, when Chancellor, made a similar decision, in the case of *Smith* and *Evans*, against a purchaser of the reversion, expectant upon such a term.

In this case, one, on his marriage, settled an estate of twenty pounds a year on himself and wife, and the issue male of the marriage, then to trustees, for a term of years upon trust, in case he should die without issue male, and leave one or more daughters living at his death, to raise 120*l.* for her or their portion or portions, by leasing, assigning, or mortgaging. The father died without issue male, leaving a wife and daughters. One then bought the reversion, subject to the widow's estate for life, and to the payment of the portions *after her death*. But, on a bill preferred by the daughters in the lifetime of the mother, to have the money raised, it was so decreed; his lordship observing, that the old rule, with respect to raising portions in the life-time of the father

Smith v.
Evans.

or

or mother, and the authorities founded upon it, were strictly right.

The reason upon which these cases are founded is, that, by the death of the mother, the possibility of issue male is extinct; therefore, all that is contingent has happened; it is then become impossible that there should be issue male; and, as to the father's death, that is not contingent, but must necessarily happen; and when the mother's death has happened, it is then the same thing to say, when the father shall die without issue male by his wife, as to say when the father shall die.

And if there be no contingency annexed to a term for providing portions, but the term is vested, and the portion payable at a day certain, then, although the term be to arise in reversion, after the death of the father, yet, if the money be made payable at a certain time, as at the age of twenty-one, or marriage, there the money will be decreed to be raised in his life-time. It is said, in *Freeman's Reports*, p. 272, to have been so decided, in the case of Lord *Tracy*; and the same point was determined in the case of *Heyter and Jones*, where a settlement was made to the husband for life, *remainder to the wife for life*, remainder to the first and other sons

Heyter v.

Jones.

1 Eq. Ca. Abr.

337.

Pl. 2.

1 P. Will. 451.

sons in tail male successively, remainder to trustees for two hundred years; and the term was declared to be upon trust that the trustees, after the death of the husband, *and* (a) wife, should, out of the profits, raise and pay 4000*l.* for young children, at the age of twenty-one years, unless the person in remainder should raise and pay the same; and the term was decreed by the Lords Commissioners to be sold, and the portions to be raised in the life-time of the father and mother. And this decree was afterwards affirmed by their Lordships on a rehearing. And again upon an appeal to the House of Lords.

2 Freem. 272.

3 Chan. Rep. 200.

1 Atk. 358.

Et Stainforth

v. Stainforth.

3 Chan. Rep.

201.

This was a case, where a man came to be relieved against his own deliberate agreement.

And, in such cases, there is no injury done to the reversioner, by decreeing the money to be raised; because it being *then* payable according to the principles adopted in a court of equity, it will, though not raised, bear interest.

1 P. Will.

480. 709.

But, although the above cases have been constantly admitted, as the law of the Court of Chancery, yet some great men have con-

(a) Lord Cowper in Corbett and Maidwell observed, that the word "*and*" might be construed disjunctively, 3 Chan. Rep. 196.

sidered

sidered them as going too far in favor of the heir, at the expence of the ancestor; and, in respect of the inconveniences attending these determinations, whereby an estate may be eaten up, and devoured with interest (because, if a reversionary term, so circumstanced, may be mortgaged, the portion may in time, by the accumulation of interest, amount to treble the sum intended; besides which the mortgagee may foreclose, and by getting reports of the money due, may make interest principle, as it must be after the report confirmed, and thereby the whole estate be swallowed up) have seized *upon any words or word* in such settlement, different from former cases, to shew that the portion still remained contingent, or from whence arguments may be drawn, that the intention of the seller was, that the term should not be disposed of until it came into possession, to distinguish such cases from those we have mentioned, and make them exceptions to the general rule, whereby they might avoid determining in conformity to those cases, which have introduced such plain inconveniences.

Corbett v.
Maidwell.
 Salk. 159.
 2 Vern. 640.
 655.
 3 Chan. Rep.
 190.

The first stand was made by Lord *Cowper*, in the case of *Corbett* and *Maidwell*; there *A*, the father of the plaintiff's wife, upon his marriage, settled lands to the use of himself for life, remainder to trustees for five hundred

hundred years, remainder to the heirs male
 of the body of his intended wife, and if he
 should happen to die without issue male of
 his body by his wife, and there should be
 one or more daughters of their two bodies,
 which should be unmarried, and unprovided
 for at the time of his death, such daughter
 (if but one) should have 2000*l.* and 30*l.* *per*
annum, issuing out of the profits, till the
 portion should become due, the portion to
 be payable at the age of eighteen or day of
 marriage, and a power for the trustees to raise
 it by sale or mortgage of the term, or per-
 ception of profits. There was but one
 daughter of this marriage, and no son, and
 the wife died; and the daughter, being above
 the age of twenty-one, and married to the
 plaintiff, the question was, whether the
 trustees could raise her portion in the life-
 time of her father? and, on great consi-
 deration, Lord *Cowper*, admitting the cases
 and distinctions before stated, said, that,
 leaving out the superfluous words, and putting
 in the words which ought to have been insert-
 ed, it would stand thus, " in case the father
 " shall happen to die without issue male
 " of the body of his wife, and there shall be
 " a daughter begotten between them, which
 " shall be unmarried or unprovided for at
 " the time of his decease." She was to
 take

Term vested,
 but portion
 contingent,
 and remain-
 der so. *Reresby*,
v. Newland.
 2 P. Will 94.
 2 Bro. Par.
 Ca. 487.

take by this description, or else she could not have this portion. Now, though the plaintiff's wife could not be then unmarried, yet she might be provided for in her father's life-time, which remained still contingent, because nobody could yet say, she would be unprovided for at the time of his decease. But the deed went farther, and said, "*Then,*" that was at the time of his decease, the said daughter should have 2000*l.* paid for her portion, and in the mean time (that was from failure of issue male until payable) the trustees should, out of the rents, issues, and profits, raise 30*l.* *per annum* for her maintenance, which must be after the father's death: for though these words "*profits, &c.*" might be construed by sale or mortgage, where they stood alone in a deed, yet, being there put in contradistinction to mortgage, they must be understood of annual profits only; and that could not be, unless you would let the maintenances run in upon the father's estate for life; so that it was plain that the words in the proviso, "if he in his life-time
 " pay, or sufficiently secure to be paid, to
 " such daughter as shall be unmarried," were there *vitium clereci*, by leaving out these words, "*or not provided for,*" at the time of his decease; and if they were inserted, all parts of the deeds would be consistent, and this plain and natural construction

tion would arise thereupon, that the father, at any time during his life, by paying her 2000*l.* should defeat the term.

But we must carefully distinguish between cases like the preceding, where part of the description of the daughters was, that she should be unmarried and unprovided for at the time of her father's death, and those where provision only is made, in case the father should, in his life-time, prefer the daughters in marriage with portions equivalent to those provided for them by the settlement; and also between cases where the words, "rents, issues, and profits," are placed in contradistinction to mortgage and sale, and are applicable to different objects, and where such words are used together and indiscriminately, as pointing out different modes of raising such portions; for, in either of the last-mentioned cases, Lord Cowper's reasoning in the case of *Corbett* and *Maidwell*, does not apply.

Thus where *A*, upon his marriage with *B*, settled his estate to the use of himself for life, remainder to the use of his first and other sons in tail male, remainder to trustees for one thousand years, remainder over; and the trust of the term was declared to be, that

Hibblethwaite
v. Cartwright.
Ca. T. Talbot.

31.

in case there should be no issue male of the bodies of the said *A* and *B* begotten, that should live to the age of twenty-one years, or be married and have issue, and that there should be one or more daughter or daughters of the bodies of the said *A* and *B*, then the said daughter or daughters should have, if but one, the sum of 4000 *l.* for her portion, and if two or more, the sum of 5000 *l.* equally to be divided between them, at their ages of twenty-one, or day of marriage, which should first happen; and, if there should be but one daughter, that then she should have the yearly sum of 100 *l.* to be paid her half yearly, by equal portions for her maintenance; and, if there should be two or more, then the sum of 100 *l.* to be paid them half yearly in equal shares, till their respective portions should be raised and paid; and, in case the portions were not paid, that then the trustees, their executors, &c. should, out of the rents or profits, or by mortgage, or sale of the premises, or any part thereof during the term, raise and pay the several portions before limited; provided that, if the father should, in his lifetime, prefer them in marriage, with portions equivalent to those therein limited, or that, after his death, the remainder man should, upon their marriage, pay them portions equivalent,

valent, or that there should be no daughter or daughters who should live to attain the age of twenty-one, or be married, that then the term should cease and be void. *B*, the wife, died in her husband's life-time, leaving no issue male, but only three daughters, who were all unmarried; and one question was, whether, upon this trust, the daughters portions were to be raised in their father's life-time? and it was held by Lord *Talbot*, that they were; for that the term was vested originally, and the portions were no longer contingent, but, immediately upon the mother's death, became vested, and that the option given to the trustees of raising either by rents and profits, or sale, or mortgage of the premises, did not warrant an inference, (which had been drawn) that the father's death must necessarily precede, since it was impossible for the trustees to raise the portions out of the rents and profits during his life: for, in deeds, it was usual to put in every way which might be made use of; but it did not from thence follow, that the daughters were to wait till the trustees could make their choice, which way they should raise their portions; that might be making them wait till their fortunes would be of no service to them; and though the mortgage or sale was to be during the term, which was not

to commence in possession till the father's death, yet the portion might well be raised in his life-time, it being no where said, that the portions should not be raised till after such time as the term should take effect in possession. Indeed, had there been no express authority given to the trustees to sell or mortgage, there might have been some difficulty; but since they had the power of doing both, they might use that which would best suit the interest of the daughters. As to the proviso, whereby the term was made void in case the father should, in his life-time, prefer the daughters in marriage with portions equivalent with those provided by the settlement, that had been objected to prove, that the parties design was, that the portions might not be raised during the father's life, by reason of the power reserved to him of providing for them in his life-time, by portions equivalent; but, in that respect, this case differed widely from the case of *Corbett* and *Maidwell*, for there it was part of the description of the daughter, that she should be unmarried, or unprovided for at the time of the father's death; which description gave the father time to perform it during his life, for the reason before mentioned; but this was no such description. And the portions were decreed to be raised with

Supra.

with interest from the mother's death, at which time they vested.

Again, words pointing out the specific and precise time when money is to be raised, will take a case out of the general rule; because they imply a negative, that, till then, they shall not be raised, and if such negative words were added, it would be out of the question; for a declaration of a trust is like the prescribing a law to the trustee, which is to be observed by him implicitly, and therein contains a prohibition to act otherwise than as directed: such an affirmation implies a negative, in the same manner, as declaring the trust of a term, that 3000*l.* be raised, implies negatively, that no more than 3000*l.* shall be raised; or as declaring that younger children shall be paid their portions at twenty-one, implies that they shall not be paid before twenty-one.

Butler *v.* Dun-
comb.
1 P. Will. 448.
2 Atk. 357.

Thus, where, upon the marriage of *A* with *B*, the father of *A* covenanted to settle lands in the articles mentioned on *A* for life, remainder to *B*, the intended wife for life, remainder to the first and every other son of the marriage in tail male, remainder to trustees for five hundred years, upon the trust therein mentioned, remainder to the use of

Butler *v.*
Duncombe.
P. Will. 448.
12 Ukl. 357.

the father in fee. The trust of the term was declared, that the trustees should, *from and after the commencement of the term*, raise portions for the younger children of the marriage, *viz.* if but one younger child, then 3000*l.* if more, 4000*l.* to be raised by the rents and profits, or by sale, demise, or mortgage, *and payable at twenty-one, or marriage.* The marriage took effect, and there was one daughter. Then *A*, the husband, died, and his father settled the estates on his daughter in law *B* for life, remainder to trustees for five hundred years, the reversion to himself in fee. The trust of the five hundred years term was, that the trustees should, from and after commencement of the term, by rents or profits, sale, demise, or mortgage, raise 3000*l.* to be paid to the daughter, at her age of twenty-one, or marriage, but there was no provision for maintenance. And on a bill filed by the daughter and her husband (she being under age) for the portion, the question was, whether it was then payable, or whether it must wait until the death of the parent, the mother, who was then but forty-three years of age? And it was held by Lord Chancellor *Parker*, that it should be raised *prout* the deed, namely, *after the commencement of the term in possession*: for, that the declaring, by the trust of the term, the por-
tion

tion should be raised after the commencement of the term, implied a negative, that it should not be raised before.

But in the preceding case, Lord *Parker* took a middle way; though he refused to raise the portion before the term came into possession, he made the reversionary term a security for the principal sum.

Lord *Parker* distinguished the case of *Saville v Saville* 1 P. Will. 456. *Butler* and *Duncombe* from the case of *Saville* and *Saville*, which was argued the same term, and where, upon the marriage of *A* with the daughter of *B*, a rent charge was settled upon her for her jointure, and a term of ninety-nine years was limited, to commence after the death of *A*, her husband, determinable upon the death of his then intended wife, in trust, the better to secure her this rent charge, with remainder of the lands, thus charged, to the first, &c. son of the marriage, with remainder to trustees for five hundred years, to raise portions for daughters, if no male issue, the portions to be paid at the age of sixteen, or marriage, which should first happen; in which case his lordship allowed, that this 500 years term for portions took place in equity from the death of *A*, the ninety-nine years term being raised for a par-

ticular purpose only; namely, for securing the rent charge, and subject to that trust, which extended only to part of the profits; whereas, in the case then in question (*Butler and Duncombe's case*) the whole profits of the estates were disposed of until the commencement of the term, to the mother for life, which distinguished it from the case of *Saville and Saville*. But Lord *Hardwick* observes, in a subsequent case, that Lord *Macclesfield* founded his decree upon the single words, "from and after the commencement of the term;" and, indeed, the latter ground of distinction between a case, where the whole profits are settled in jointure, and a case where only part of them are so settled, seems not to be of great weight; for the same circumstance occurred in the cases of *Heyter and Jones*, and *Staniforth and Staniforth*, and *Smith and Evans*.

Vid supra.

But necessary inference, furnished from the circumstances of the case, being inconsistent with the design of raising the portions, before the term comes into possession, is sufficient to distinguish a case out of the general rule before alluded to.

Brome v.

Berkley.

2 P. Will. 484.

2 Bro. Parl.

ca. 437.

Thus, where lands were settled on the marriage of *A*, in the usual form, with a remainder

remainder to trustees, and their heirs in trust, that, if the said *A* should have no son by the marriage, or if, having sons, they should all die before twenty-one, without issue, then the trustees should, out of the rents and profits of the premises, or by sale or leasing, or otherwise, raise for the daughters of this marriage, if but one, 2500*l.* payable at twenty-one, or marriage, which should first happen; and should also raise and pay the yearly sum of 100*l.* by half-yearly payments, for her maintenance and education, until her said portion should be due, *the first payment of the maintenance money to be made at such of the said half-yearly feasts, as should next happen after the estate so limited to the trustees as aforesaid should take effect in possession,* together with farther provisions, if there should be more daughters than one; particularly if more than three, that the trustees, &c. should stand seised of the premises for the benefit of all and every of the daughters, to be divided amongst them equally, as tenants in common, and of their respective heirs and assigns for ever. The husband died, having left no issue male by the marriage, and but one daughter, who, being twenty-one, filed her bill in the life-time of her mother (who had her jointure on the premises) against the trustees, for the raising of this portion by sale

or mortgage, of their reversionary trust estate, and also with interest from the time the same became payable; but the bill was dismissed by Lord *Macclesfield*, on a hearing before him and the Master of the Rolls, upon the ground, that all contingences had not happened, since the estates for life must all determine before the portion could or ought to be raised. The court admitted that the intention, as to the manner of raising the portion, ought to prevail; but here the intention was plain, from the fact, that the maintenance for the daughter was not to be paid until *the trust estate, chargeable with the portion, took effect in possession*, and the payment of the maintenance must be intended to precede the payment of the portion. The maintenance must determine when the portion became payable, and this was the plainest indication imaginable, that the parties intended the portions should not be paid until the trust estate came into possession, which made this a stronger case than that of *Butler and Duncombe*; and this decree was affirmed on appeal to the House of Lords.

The principles laid down by Lord *Parker*, in the case of *Brown and Berkely*, were followed up by Lord *Hardwicke* (whose general inclinations were against raising por-

tions in the father's life-time) in that of *Stevens* and *Dethick*. There a question arose upon a settlement made on the marriage of the defendant; the first limitation of which was to the defendant for life, without impeachment of waste; then to trustees to preserve contingent uses, remainder to his wife, remainder to the first and every other son of the defendant's body; and in default of issue male, then remainder to trustees, for a term of five hundred years, upon trust that, if there should be one or more daughters, the trustees, their executors, or administrators, should, out of the yearly or other rents, issues and profits, by sale, lease, or mortgage of the said manors, messuages, lands, &c. or any part thereof, comprized within the said term, raise and pay unto such daughter or daughters the sum of 2000 *l.* for her or their portion or portions, to be paid to such only daughter (if there was but one) at her age of twenty-one, or day of marriage, which should first happen; and if they all died before their portions became due, then the said payments to cease, as to their executors and administrators, and to sink into the estate for the benefit of the person to whom the reversion should belong; and also, that such daughter or daughters should have out of the premises, comprized in the term of five hundred

Stevens v.
Dethick.
3 *Alk.* 40.

hundred years, such yearly maintenance as was suitable to their dignity and quality, and that the residue of the rents, issues, and profits, above such yearly maintenance, should, *in the mean time*, till the portions became payable, be received by such persons as should be entitled to the reversion *immediately expectant upon the determination of the said term*. The mother died, and left no other issue but a daughter who was married. The bill was brought by the husband and the daughter against the father and the trustees, to raise the portion immediately. Lord *Hardwicke* observing, that the grounds on which the portion was refused to be raised in the case of *Brome* and *Berkley*, both in the Court of Chancery and House of Lords, were, that maintenance being given, *and by the very terms of the trust to precede the portion, and not to be raised*, till the term took effect in possession, *a fortiori*, the portion was not due and payable till then. Apply that to this case. The trustees of the term were, out of the yearly or other rents, issues, and profits, or by sale, lease, or mortgage of the said manors, &c. to raise and pay unto such daughter, &c. the sum of 2000*l.* for her and their portion, &c.; and also such daughter or daughters were to have, out of the premises comprised in the

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the term of five hundred years, such yearly maintenance, as was suitable to their degree and quality; and the residue of the rents and profits above such yearly maintenance, was in the mean time, till the portions became payable, to be received by such persons &c. This was the same case as that of *Brown* and *Berkley*, only that there it was prayed to be raised in the life-time of the mother; here, in the life-time of the father, which, if any thing, was more unfavourable. The maintenance then was to be raised out of the rents and profits, after the first quarter-day, when the term *should take effect in* POSSESSION; here the words, *in the mean time*, were words of relation, and referred not only to a time that was to begin, but to a time which was also to end; but of what rents, issues, and profits, could the trustees then receive any thing? Could they bring ejectments? No, for they could not enter to raise the money out of the profits, till after the death of the father. His lordship was of opinion, that the father might have sold the reversion subject to this term; which shewed, that the whole trust of the term was to take effect after the death of the father.— By the same argument as had been made use of for raising the portion, the maintenance might have been raised in the life-time

time of the father, as well as the portion; but it was the subsequent words that confined it to the time, if the terms take effect in possession. It was said, that in the case of *Brome* and *Berkley*, there were the words "*take effect in possession*," and no such words here; but those words were made use of there, only to shew, that maintenance could not be raised in the life-time of the mother. The same argument would hold as strong here; for though the words were not exactly the same, yet they were of equal force, namely, "*immediately expectant upon the determination of the term*."

But, Lord *Hardwicke*, in the last-mentioned case of *Stevens* and *Detbick*, seemed to think that stronger circumstances were necessary, to shew that portions were not to be raised until the term for securing them came into possession, where the claim arose under a will, than where it arose under a settlement; and his Lordship urged that as one ground for distinguishing between that case and the case of *Hall* and *Carter*, decided by him at a prior period of time.

Infra.

Sandys v.

Sandys.

1 P. Will. 709.

The circumstance of its being directed, that a portion shall be raised out of rents and profits, or *by mortgage*, is not a reason why it

it should wait till the term comes into possession, in order that the trustees may make their election; indeed, this ground was taken in argument in the cases of *Brome* and *Berkley*, and *Hall* and *Carter*, but was over-ruled by Lord *Hardwicke* in the latter case, his Lordship observing, that there were many cases of settlements where this election was given to trustees, and yet they had not been allowed to postpone the raising, in order to make their election only.

There *A*, by his will, created a term of one hundred years, in trust, out of the rents and profits of the premises, or by mortgage thereof, to raise portions of 100l. for each of the daughters of his son *B*, payable at eighteen, or day of marriage; and moreover to pay to every such daughter or daughters the sum of 6l. a year for their maintenance, till their respective portions should become due and payable; with a proviso, that it should be lawful for his son *B* to make a jointure to such woman as he should marry, of *all* or any part of the premises limited to him, and in case of failure of issue male of *B*, the like limitation to his two other sons; with a proviso, that, in case such person or persons as should be next in remainder or reversion, expectant upon the said

Hall v. Carter,
2 Atk. 355.

said term of one hundred years, should and would pay unto such daughter or daughters of the said *B*, or their guardian, or to such person as should be lawfully authorized to receive the same, all and every of their respective portions of 100l. a-piece, either before or after the same were due and payable, by the direction of his will; that then the said term of one hundred years should, from thenceforth, cease and determine for the benefit of such person or persons, in remainder or reversion as aforesaid. *B* had daughters, but no son, and *died*, leaving his widow, who had a jointure of the whole estates devised under the will. And the question was, whether the daughters' portions should be raised, in the life-time of the mother, by mortgage of the reversionary estate? And Lord *Hardwicke* determined that, they should be raised immediately. And his Lordship distinguished this case from that of *Brome* and *Berkley*, upon the ground that, in the latter case, the daughter was not entitled to have any maintenance till the term took effect in possession, but in the present case, it was far otherwise; for the maintenance was actually a charge upon the estate, and the trustees were to pay 6l. *per annum* to each daughter till their portions respectively became due and payable, and was not postponed

Supra.

Lord Maclefield thought this no reason, because, if so, then interest might, by

poned until after the term came into possession, so that maintenance run on till then.— foreclosure, be
got upon
interest.

And though he did not know any instance, where a sale had been directed for maintenance out of rents and profits (because it must be annual, which would create endless trouble) yet it was a charge upon the estate, and the arrear which was incurred must be paid off after it came into possession. Then where could be the objection of mortgaging the reversion then, or what harm could it be to the reversioner? Because, the moment the term came into possession, the arrears of the maintenance must be satisfied. As to the objection, that the portion being directed to be raised out of rents or profits, or by mortgage, therefore ought to wait till the term came into possession, that trustees might make their election, this was the argument in *Brome* and *Berkley*; but there were many cases of settlements where this election was given to trustees, and yet they not allowed to postpone the raising, in order to make their election only. And his Lordship said he was not clear whether it might not be raised by sale, if it had stood only upon the words, "*rents and profits*," which had been held to carry a fee.

Although children, who claim portions so circumstanced, are entitled to other provisions, they shall, notwithstanding, have their portions raised when payable; for that circumstance does not furnish any ground to suspend the raising them; because, if they have a right to portions by the settlement, they ought not to lose that right by having a farther provision.

P. Will. 94. In the case of *Keresley and Newland*, Lord *Macclesfield* laid some stress on the words "to be raised by rents and profits, or by sale, or mortgage, and be paid at the daughter's attaining the age of eighteen, or marriage, or within as short a time after as the same should or might be conveniently raised;" observing, that, in his opinion, it could not be conveniently raised by selling a reversion, which would incommode the family to that degree as to ruin the estate; for which reason he thought that it could not be conveniently raised until the death of the father. But his lordship was of opinion, in the case of *Trafford and Ashton*, where the tenants for life were dead, and the question was between the remainder man, a remote relation, and the daughters of the seller, whether the trustees might sell or mortgage a term, the trusts of which were declared

clared to be, that if the seller should die without issue male of the said marriage, and should leave one or more daughters, then the trustees should, out of the rents and profits, raise 8000 l. for the daughters of that marriage, to be paid to them as soon as conveniently could be, without limiting any express time when the portions were payable, that the portions were presently payable; for the daughters being twenty-one at their father's death (who survived their mother) and marriageable, it was then convenient that they should have their portions.

And the words, which direct the payment of the portion at twenty-one, or marriage, do not at all militate against the construction last alluded to in favour of the heir or reversioner, where, from the words in the instrument, there is room to admit it; because, such words, *nevertheless*, have their effect, for they vest a right in the portion in the child, when it attains that age, or the event referred to arrives, and, thereupon, the portion, in case of the death of the party intitled to it, becomes transferable to executors or administrators, as a vested interest.

1 P. Will. 451.

Nor will the objection, that the settlement does not provide maintenance until the portion is payable, be of any weight to prevent the construction alluded to, for there is no reason that equity should supply that, any more than that it should supply the want of a portion, if none were provided. In truth, this may be industriously omitted by a settlement, as intending to leave the child to depend upon the mother, who, by the law of the land, and of nature, is bound to provide for it.

But where no particular time is mentioned for the payment of portions, though the same are secured by a term, and directed to be paid out of the rents, issues and profits of the premises comprised in the term, courts of equity, who use a discretionary power in such cases, if the children to take be of tender years, although the events have happened on which they are to vest, will not raise them by sale or mortgage, but will leave them to be paid out of the profits as they accrue; considering these as cases of portions to be raised by perception of profits without interest, and, therefore, not due until produced thereby: The cases of *Evelyn* and *Evelyn*, and of the Earl of *Rivers* and the Earl of *Derby*, fall under this distinction.

2 P. Will. 660.

2 Vern. 72.

In

In the case of *Pierpoint* and Lord *Cheney*, Lord *Macclesfield* inclined strongly against raising maintenance by mortgage of a reversionary term expectant on the death of the wife, although the maintenance as well as the portion was directed to be raised by the trustees, in the settlement in question, either by rents, issues, and profits, or by sale or mortgage, and to be paid quarterly, the first payment at such of the four usual feasts as should next happen after the decease of the husband; observing, that he had not been able to find one single precedent for mortgaging a reversion for maintenance.

1 P. Will. 489.
Et vid. Ravenhill & Dansey.
2 P. Williams, 180.

But, in the report of the case of *Pierpoint* and Lord *Cheney*, one of the council cited a case of Lord *Herbert*, decreed by the Master of the Rolls, wherein the late lord *Herbert* gave his real estate to his nephew, subject to a term for years, which was declared to be upon trust by sale or mortgage, or with the profits, to raise 3000 *l.* a piece for his two sisters, and 100 *l.* *per annum*, maintenance money; and the estate happened to be so incumbered with jointures and rent charges, that there was not enough to pay the maintenance; whereupon the court decreed a mortgage of the term to raise it.

1 Peer Will. 490.

And Lord *Macclesfield* himself, afterwards, decreed in a case wherein, otherwise, the children must have been left unprovided for *by the settlement*, that maintenance should be raised by the mortgage of a reversionary term *vested in interest*.

Ravenhill v.
Dansey.
2 P. Will. 180.

In the case alluded to, there was a term of 500 years limited to trustees, to raise portions for daughters in case of no issue male by the marriage. The trustees of the term were to raise 2000 *l.* a piece for the daughters of the marriage, payable at their ages of eighteen, with maintenance money at the rate of 40 *l. per annum*, to each daughter *from* the deaths of their father and grandfather by the mother's side, until their portions should become payable. The father died leaving two daughters, one eight and the other nine years old, and the term did not commence in possession until the death of a third person, which happened some time afterwards. The trust of the term was to raise the portions by sale, mortgage, or profits; but the trust to raise the maintenance was, by rents or profits, so that there was a difference in the deed, between the manner of raising the portions and that of raising the maintenance. And, upon these facts, it was objected, that the maintenance
should

should not begin until the 500 years term commenced in possession, at which time only the same could be raised by rents and annual profits. *Et per Lord Macclesfield, Chan.*

“ it is against my opinion to raise a portion or maintenance by selling a reversionary term, and under colour of the word *profits*; but it has been ruled before my time, that profits shall extend to any advantage, which shall be made of the land by sale or mortgage, as well as rents; especially, in cases of necessity, and when the daughter has had no other maintenance, it has been decreed to be raised by a mortgage of a reversionary interest of a term. But the present case is much stronger; for, here the trust term for raising this maintenance and portion is come into possession, so that, at present, the maintenance money must be raised out of the annual profits; it is like a rent granted out of a reversion to commence presently, in which case, though the reversion does not fall into possession until many years after, yet when it does fall, it shall answer all the arrears. So let the arrears of the maintenance money, from the time the same became payable by the settlement, be raised out of this term.

Butler v.
Duncombe.
supra.

Before we drop this subject it may be proper to observe, that to prevent questions

of the foregoing kind respecting portions, it is usual in modern settlements to insert a clause, that no sale or mortgage shall be made for raising portions, until the estate shall vest in possession.

Ewer v.
Corbett,
2 P. Will. 149.
Humble v.
Bill.
2 Vern. 444.

An executor is also now considered as invested by the law with the power of selling, and consequently mortgaging, leases for years and chattel interests belonging to his testator, although it appears to have been once decided in the House of Lords otherwise, namely, that an executor could not make a good title to a term to a purchaser; and a judgment in favour of the vendee, upon that ground, was reversed in the House of Lords: But the case as it stood in the House of Lords has since been considered as a case of fraud, and as such standing upon its own particular circumstances. And, if it were otherwise, no one would venture to deal with an executor, and it would follow, that an executor would be under an incapacity, and disabled to sell, though there were ever so much occasion for it for payment of debts. And this seems reasonable; for how can it be expected that a purchaser should take upon him to make out the account as to the quantum of debts or assets, when he is not entitled to have the vouchers to make out

out such account? Therefore, if such estate be sold or mortgaged in prejudice of a specific or residuary legatee, his remedy would be against the executor; but he cannot follow the property into the hands of a purchaser.

But voluntary alienation by collusion of an executor, will not be binding upon the parties entitled, but will be set aside in equity, which will follow the property in such cases.

Nugent v.
Gifford,
1 Atk. 463.
Crane v.
Drake,
2 Vern. 616.

Where a will contained a clause in the following words, namely, That the trustees should, by perception of rents and profits, or by leasing or mortgaging the same, raise and levy the sums and legacies made payable out of lands, amounting to 30,000*l.* and should pay the same in such manner as in the said will before-mentioned. Lord *Hardwicke* refused to decree a sale, observing, that where a man created a term for payment of debts, and declared the trust of that term to be by perception of rents and profits, or *by leasing or by mortgaging* to raise sufficient money for the payment of his debts, it restrained it merely to a payment out of the rents and profits; if it had been a trust of the rents and profits, he said the term might have been sold for the satisfaction of creditors.

Ridout v.
Earl of Ply-
mouth,
3 Atk. 105.

C A P. V.

Of the Mortgagee, &c.

IN respect of the mortgagee of land, he must be a person capable of possessing real property; for a mortgage being at law a conditional sale, no one who is under a legal impediment to take by a purchase, can have the capacity to take by a mortgage. But any one who is capable of taking an absolute purchase, may, it seems, take by mortgage; consequently, all natural and politic or corporate bodies, that are not disabled by law, may be mortgagees. And it seems that some persons, that cannot be mortgagors, may be mortgagees; for an alien may be a mortgagee; but if a mortgage of land be made to him in fee simple, or for a term of years, he cannot hold it, but the king will be entitled to have it from him,

A person attainted of treason or felony, before or after attainder may be a mortgagee, but he cannot hold the thing mortgaged; so a person out-lawed may be a mortgagee of lands, but the king will be entitled in both cases to the property, in them, subject to the condition in like manner as the attainted person or out-law held them.

So a *feme covert* may be a mortgagee, but cannot be a mortgagor, unless by construction of equity on an agreement that she shall possess separate property, in which case she may probably be so considered.

And an infant may be a mortgagor.

C A P.

C A P. VI.

How a Mortgage is considered in Equity.

AT common law, while the strict rules of the feudal system were permitted to remain checks upon the free alienation of real property, no idea was entertained of making it subservient to the ordinary exigencies of its owner, by suffering it to become the subject of a pledge. The landholder, therefore, however pressing his necessities might be, had no means of raising money on his estate but by a conditional sale; and if, by any unforeseen event, he became incapable of performing the condition strictly, or at least in effect, at the time appointed, his property in the land was gone from him, and absolutely vested in the purchaser, without any possibility, at law, of recovering it. The consequence of which was, that an estate of great value might be forfeited

forfeited for a trifling consideration. But when the stern and rigid severities of that tenure yielded to the importunities of a more refined age, and the benefits of commerce were found to keep pace with the extension of a free alienation, the courts of equity moulded contracts respecting real property into the shape most convenient for the purposes of society. In adjusting the various rules respecting it, many contests arose between the courts of law and equity; the former ever displaying a strong inclination, to adhere to the old rigid maxims introduced for the purpose of preserving real property unalienable; whilst the latter were disposed to consider the essential nature of contracts, and to give them operation according to the intention of the parties stipulating. In the end they prevailed, and an equitable jurisdiction was gradually introduced, which by correcting without enfeebling the severe rules of the common law, laid the foundation of a system of jurisprudence, admirably adapted to the attainment of substantial justice.

The law respecting mortgages became almost a subject of exclusive jurisdiction in those courts; for although in law, the mortgagee (the mortgage being effected by a conditional

Proc. Ch. 99.
Barnard. 93.
1 Vez. 361.

1 Vern. 575.

Roper v. Rat-
cliffe, 9 Mod.
196.

conditional alienation of the land and an actual livery) was considered as the proprietor, subject to be divested of it only by the strict performance of the condition, yet, in equity, the transaction was deemed a mere personal contract for the loan of money, and the land a security for the due performance of that contract, and the mortgagor was looked upon, notwithstanding the solemnities attending the conveyance, as the actual owner of the land. The debt consequently was there esteemed the principal, and the land the incident; and whenever the debt was discharged, the interest of the mortgagee and all derivative and incidental interests dependant thereupon, in the land determined of course, the land being, in equity, bound with the power of redemption; in whatever hands it might be, the legal possessor became in equity, as to any estate outstanding, a trustee only for the mortgagor. But until redemption or satisfaction, the mortgagee's interest was good, in equity, to entitle him to receive and enjoy the profits.

From viewing the subject in this light, this conclusion necessarily followed, that a mortgage was not such an alienation of a man's real property, as altered any disposition of it previously made; but only in so much

much as it was thereby necessarily affected; *ex. gra.* having been pledged by the owner, it could not be recovered by him or his alienees, but by discharging the demand for which it was a security, that being a lien thereupon.

Thus where T, seised in fee, settled his lands by a voluntary conveyance to the use of himself for life, with remainder to his daughter and heir apparent in tail, remainder to his three brothers in tail, remainder to himself in fee, with power of revocation; and seven years after mortgaged those lands in fee to one of the three brothers, that were remainder-men; and the condition of redemption was, that if the mortgagor or his heirs paid the money at the day, he should have the land in his former estate; the mortgage became forfeited, and the mortgagee afterwards purchased of his elder brother, who was the heir at law. The third brother then brought his bill for the third part, by virtue of the remainder in tail limited to him and his two brothers; and the question was, whether the mortgage was a total revocation, or only *pro tanto*? and held it was a revocation *pro tanto* only, the mortgogor being to have the lands, on payment, as in his former estate.

Thorne v.
Thorne,
1 Vern. 182,
et vid. Fitzgib.
217.

So

Hall v. Dunch.

1 Vern. 329,

342.

Lord Bridge-
water v. Duke
of Bolton.

2 L. Raym.

968.

2 Will. 649.

Earl of Lincoln
v. Rolle.

Show. Parl.

ca. 156.

Montague v.

Jefferys, 1 Roll.

Abr. 616, let-
ter u. No. 2.

2 P. Will. 335.

1 Salk, 158.

1 Vern. 97.

3 Atk. 748.

1 Vern. 342.

So where *I S.*, in 1663, by his will in writing, devised lands to *A*, in tail male, remainder to the plaintiff in fee, and having afterwards occasion for money, mortgaged those lands in fee, and in 1683 died: *A* being dead without issue, the plaintiff, who had the remainder, brought his bill to be let into the benefit of this devise. It was objected by the council for the defendant, who was the heir at law, that this being a mortgage in fee, was an absolute revocation of the devise; although, if it had been but a mortgage for years, then they admitted the reversion would have passed, and that would have carried with it the equity of redemption, and so the revocation would have been *pro tanto* only. But here being an estate in fee mortgaged, *that* went to the whole, and was a full and absolute revocation in law; and being so in law, there was no reason for equity to aid the plaintiff against the heir at law. But the Master of the Rolls was of opinion, that a mortgage was a revocation *pro tanto* only, which decree was afterwards affirmed upon appeal to the Chancellor, his Lordship declaring, that though the mortgage in fee was a revocation at law, yet, in equity, it should not be taken for a total revocation, but the devisee should be admitted to the redemption, For the intent of the

mortgagor, in making the mortgage, could be no other than only to serve his special purpose of borrowing money to supply his present occasion.

But, if the mortgage be made to the devisee, subsequent to the devise, that will be a total revocation, the two interests of a mortgagee and a devisee being inconsistent with each other. As where one seised in fee of the lands in question, and having one son and one daughter, made her will, and thereby devised them to her daughter and her heirs, and afterwards, for securing 4000*l.* which she was indebted to her daughter, she and her son joined in a mortgage of them to her for five hundred years, to be void on payment of 100*l.* *per annum* to the daughter during her mother's life, and the 4000*l.* with interest, within three months after her mother's death. The question was, whether this mortgage to the daughter, being made subsequent to the devise, were a revocation of the devise in fee to her by the mother's will, or only *pro tanto*? And it was urged, that the mother's intention, in making this mortgage, was only with a design to secure the 4000*l.* she stood indebted to her, not to revoke the devise in fee: but it was decreed to be a revocation *in toto*, for it was made to
the

Harkness v.
Bayley, Prec.
Ch. 514, et vid.
Coke and Bul-
lock, Cro. Jac.
49.

the same person as was devisee, and, therefore, inconsistent with the devise.

Mellor v.
Lees, 2 Atk.
495, *infra*.

Every contract for the *securing* of money, by the conveyance of a real estate to the lender, not made in contemplation of an eventual arrangement of property, is, in equity, deemed a mortgage; and all provisos and stipulations between the parties, tending to alter, in any subsequent event, the *original* nature of the *mortgaged interest*, or prevent the redemption of the estate pledged upon payment of the money borrowed, with interest, are void. For were any such agreements suffered to prevail, they would put it in the power of every mortgagee to take advantage of the necessities of the mortgagor, by inserting restrictive clauses to prevent a redemption of the estate pledged, unless upon terms injurious to the latter. In equity, therefore, the right of redemption is considered as inseparably incident to every contract founded on a mortgage, and can no more be restrained, than the power of tenant in fee-simple, to alien generally, or of tenant in tail to suffer a recovery; it being a maxim, that the *same* estate or interest cannot be a mortgage at one time, and at another time cease to be so.

Thus,

Thus, where Sir *Robert Jason*, father of the defendant, being seised of an estate chargeable with a mortgage for 4500*l.* and interest, to one *Fisher*, entered into a treaty of marriage with the plaintiff, and, by articles, it was agreed, that 2100*l.* should be paid towards that debt, with 1500*l.* the portion of the plaintiff, and 600*l.* advanced by Sir *Robert*, which reduced it to 1900*l.* for securing payment whereof, by instalments at certain times, a lease of the premises for five hundred years, was made to *Travers* and *Finch*, defendants, with a proviso, that afterwards they should join with Sir *Robert* to convey the premises to trustees and their heirs, to the use of Sir *Robert* for life, remainder to the plaintiff for her jointure and in full of dower, remainder to the trustees and their heirs, in trust, that if Sir *Robert* should pay the 1900*l.* with interest, amounting to 2700*l.* within the said time, if he should so long live, or otherwise *within three years* after the date of the last-mentioned conveyance, and procure the lease to be surrendered, to the intent that if the defendant, Dame *Anne*, survived him, she, so long as she lived, might hold the premises discharged of the same, then the said trustees should be seised of the premises to the use of Sir *Robert* and his heirs; but in case either of failure of

Jason v. Eyres,
2 Chan. ca. 33.
Trin. 32 Car.
2.

payment, or Sir *Robert*'s death before payment and surrender of the lease, then that the trustees, and the heirs of the survivor of them, should stand seised of the reversion, to them limited, in trust for the plaintiff and her heirs, *not only to enable her to pay the debt, and free her jointure thereof, but to the end she might enjoy the inheritance for increase of her fortune,* according to an agreement between her and Sir *Robert*; and should convey the same as she, during coverture, or sole, or her heirs, should direct. Sir *Robert Jason* died, leaving the defendant his heir. Dame *Anne* married *Eyres*, one of the plaintiffs, who, there being a former incumbrance not taken notice of, paid it with damages.

On this case, cross bills were filed by *Eyres* and his wife to have the inheritance, and by the heir of Sir *Robert* to have the inheritance on paying the debt.

On the hearing, it was argued for *Eyres*, that it was an express agreement that the wife should have the inheritance, if the debt were not paid, or the lease surrendered; that it could not be a mortgage as to the wife, though the lease was a mortgage to *Fisher*; that if it had been meant to have been a mortgage, the power of redemption would have

have been limited to the heir as well as to Sir Robert; *but it was only limited to him, and not to his heir*; that there was reason for so doing, because her whole portion had been expended in reducing the debt, and so, until payment thereof, she would otherwise have been without any profits of her jointure; that in contemplation of this, it was expressly agreed, the reversion settled in the trustees should go to the complainant and her heirs, not only to enable her to pay the debt, and free her jointure, but to the end that she might enjoy the inheritance for the increase thereof. But the court decreed it a mortgage, saying, that if the father, Sir Robert, had lived after three years, it could not have been denied but he might have redeemed it; and that no mortgage could be altered by any artificial words, unless by subsequent agreements.

So where *A*, having settled a jointure on the plaintiff before marriage, which proved defective, and not of value according to the marriage-agreement, afterwards made her an additional jointure of other lands, and then, in 1673, made a mortgage to the defendant *B*, for securing 1000*l.* with interest, in which, among others, part of the jointured lands were comprised; in the

K 2

mortgage-

Howard *v.*
Harris, 1 Vern.
33, 190.
Sc. 2 Ca.
Ch. 147.
Sc. 2 Vent.
364.

mortgage-deed there was a special clause of redemption, that if *A*, or the heirs male of his body, should, in June 1686, pay the principal sum and interest in the mean time, then he, or the heirs male of his body, should be admitted to redeem; and there was likewise a covenant to pay the 1000*l.* on the — day of —, 1686, and interest in the mean time, by half-yearly payments. *A* died without issue, and his wife, being a jointress of part of the mortgaged premises, and so entitled to redeem the whole, exhibited her bill, in 1677, for that purpose. The cause was heard before Lord Chancellor *Nottingham*, and afterwards re-heard before Lord Keeper *North*; and both decreed, that the mortgage should be redeemed *notwithstanding the mortgagor's death without issue*; the rather, because the defendant had a covenant for re-payment of his mortgage money.

Kilvington v.
Gardiner,
1 Vern. 192.
Cited in the
last case.

So, where the condition of a mortgage was, to redeem *during the life of the mortgagor*, it was decreed, that the heir might redeem notwithstanding.

It makes no difference whether the proviso for redemption be in the same deed, or the conveyance be absolute, and the power

power of redemption given by a distinct instrument.

Thus, where *A*, having a church-lease for three lives, conveyed and assigned it to the defendant, *B*'s father, in consideration of 550*l.* and the conveyance was absolute; yet *B*, the purchaser, by deed under his hand and seal, agreed that if *A*, at the end of one year, then next ensuing, paid him 600*l.* he would re-convey. The 600*l.* was not paid, two of the lives died, the lease was twice renewed by the defendant and his father, and twenty years had passed since the first conveyance, when *A*, being a prisoner in the Fleet, and indebted to the Warden for chamber-rent, assigned to him all his right, title, interest, equity, and power of redemption in the lease; whereupon he brought his bill to redeem, and it was so decreed on payment of the principal, and also the fines paid upon the renewal of the leases, with interest.

Manlove v.
Ball et Bruton,
2 Vern. 84, et
vid. Croft v.
Powell, Co-
myns 603.

Nor will an agreement to make the conveyance absolute upon payment of a farther sum, if the money lent be not paid at the day appointed, alter the case; such stipulations being deemed unconscionable, because a man ought not to have interest for his money and a collateral advantage besides;

Willet v.
Winnell, 1
Vern. 488.

nor may he clog the redemption by any bye agreement. Therefore, where the plaintiff was the youngest son of his father, and the father being seised according to the custom of the manor of *W*, of a copyhold tenement of the nature of *Borough English*, of the value of 15*l. per annum*, borrowed 200*l.* of the defendant's father in *April* 1671, and, for securing the same, made a conditional surrender into the hands of two customary tenants of the manor, to be void on payment of the 200*l.* with interest in *April* 1672; and at the same time the plaintiff's father entered into a bond, conditioned that if the 200*l.* and interest should not be paid at the day, then, if the defendant's father should, within ten days afterwards, pay him, his executors, administrators, or assigns, the farther sum of 78*l.* in full for the purchase of the premises, the bond should be void, or otherwise should stand in full force. The plaintiff's father died in 1671, before the mortgage was forfeited, leaving the plaintiff, an infant of two years old. The 200*l.* with interest, not being paid at the day, the defendant paid the 78*l.* the next day, when, according to the condition of the bond, the mortgage was forfeited, to the administrator of the plaintiff's father. The plaintiff's bill was to redeem on re-payment of the 200*l.*

with interest, discounting the profits. The defendant, by his answer, insisted it was an absolute purchase, but the court decreed a redemption, not doubting but it continued a mortgage; and, as to the 78*l.* declared *that* to be well paid to the administrator, and ordered the whole to be repaid with *costs*, discounting the *mesne* profits.

So where *A*, the defendant, lent money to *B*, to carry on buildings, taking a mortgage from him to secure 16,000*l.* with legal interest; and, in another deed, executed at the same time, took a covenant from *B* that he should convey to the defendant, if he thought fit, ground-rents, to the value of 16,000*l.* at the rate of twenty years purchase; on a bill to redeem, the defendant insisted upon the agreement, but a redemption was decreed on payment of interest, principal, and costs, without regard thereto.

Jennings et al'
v. Ward, et al'
2 Vern 520.

Again, where the plaintiff being seised in fee of the lands in question worth 200*l.* *per annum*, mortgaged the same in 1637, to the defendant's father for 250*l.* and agreed and also sealed a deed for the absolute sale thereof, if the money were not paid at the end of seven years; a redemption was decreed, notwithstanding; for the defendant's father,

Bowen v.
Edwards,
1 Rep. Ch.
222. 13 Car. 2.

having exhibited a bill against the plaintiff for the land or the money, made it evident that it was only a mortgage originally, and being so at first, the subsequent agreement could not alter it.

And although a mortgagee have a power to mortgage or to sell the lands mortgaged absolutely, in case of failure of payment at a given time, a court of equity will, nevertheless, consider any conveyance by him to be subject to redemption, if it be evident from the *res gestæ*, that the vendee did not depend upon the power; as if the equity of redemption be excepted in the conveyances.

Croft v. Powell, Comyns
603.

Thus, where a conveyance of lands was made, by lease and release, by *A* to *B*, and his heirs, and by a defeazance bearing date with the release, it was agreed that if *A* repaid 1000*l.* &c. borrowed of *B*, within a year from the date of the indenture, then *B* should re-convey to him; but if he failed to pay the money within the year, then *B* should mortgage, or absolutely sell the lands, free from redemption, and out of the money raised by such mortgage or sale, pay the said 1000*l.* &c. and interest, and be accountable for the overplus to *A* and his heirs. A fine was also levied to *B*, in order to bar *A*'s

wife of dower. Afterwards, the money not being paid at the time stipulated, *B* agreed to convey the estate for a certain sum of money, and in the agreement, and also in the conveyances, an exception was made, and in such exception the defeazance was mentioned. And afterwards a question arose, whether the purchaser had an absolute estate, or an estate redeemable. And it was contended that he had an absolute estate, for that the estate conveyed to *B* was an absolute estate, and though there was a defeazance executed at the same time, yet that was to have operation only within a twelvemonth, after which period, *B* was invested with a power to sell absolutely free from all equity of redemption; consequently, it then became a trust for *B* to sell, and where an estate was conveyed to trustees to sell, the vendee, by virtue of such sale, had an absolute fee, free from all charges and power of redemption. And the fine, it was said, passed the right of the then owners in the estate, and made it absolute. But it was answered, and resolved by the court, that the estate was redeemable, for the estate conveyed by *A* to *B* was, in its nature, a mortgage to him, and though the money was not paid within the year, yet the mortgagor might still have redeemed at any time while the estate continued in *B*; and
then,

then, though *B* had a power, on non-payment within the year, to mortgage or sell in order to raise the money lent, and to be accountable for the overplus, it was not then to be considered what he might have done, but what he *had* done; and it was evident that it was not *B*'s intention to convey an absolute and indefeazable estate, for he had not conveyed it absolutely, and free from the equity of redemption; but had insisted upon having the defeazance inserted. If then, as was the case, *B*, on non-payment of the money within a year, stood as a trustee for *A*, subject to the defeazance, his (*B*'s) vendee coming in with notice of that trust, would stand in his place, and must be considered as taking the conveyance, liable, in equity, to the performance of the trust; and the fine made no difference, for it only operated to strengthen the estate and free it from the dower of the wife, but it confirmed it in *statu quo*, and did not discharge it from the equity of redemption to which it was before liable.

Nor will any subsequent agreement, entered into between the assignees of the mortgagee and other persons to restrict the period of redemption, though creditors of the mortgagor, alter the nature of a contract,

contract, originally founded on a mortgage.

Thus, where one creditor (lands mortgaged, or the equity of redemption of them being subject to debts, and the mortgagee having exhibited a bill to redeem, or be foreclosed) undertook to redeem, entering into an agreement with the other creditors, that, if they paid him the money at a day appointed, they should redeem, otherwise the lands should be his absolutely. Though the creditors failed to pay the money at the time agreed upon, yet, upon a bill exhibited by them afterwards, a redemption was decreed.

Exton v.
Greaves, 1
Vern. 138,
infra.

But it seems questionable whether a power of redemption can be set up upon a subsequent agreement, made after an absolute conveyance executed; for if it be a mortgage, it must be so *ab initio* on the original agreement.

And, therefore, where one having the reversion expectant upon the determination of a lease for life, in an estate worth 1000*l.* *per annum*, conveyed it in fee to *WR*, in consideration of 1000*l.* and no more, and the tenant for life died, a pretence was
set

Vid. Cople-
stone v. Box-
will, 1 Chan.
Ca. 1.
3 Salk. 241.

set up that this conveyance was no more than a mortgage, because *W R* had declared *that he did not* know how long he should enjoy the estate, and that he would take his money again with interest; *sed dubitatur per curiam*; and one reason was, because matter subsequent will not make it a mortgage, if it was not so upon the original agreement.

But although Courts of Equity will not suffer the mortgagee to clog the redemption with any stipulation for a purchase, at a specific price agreed upon at the time of the loan, because the admission of such a practice would furnish an inlet to great fraud and imposition upon the mortgagor; yet, I apprehend, a mere agreement that, in case of sale, an opportunity of pre-emption should be given to the mortgagee, would be decreed; but it must be claimed at a reasonable time; for, where *A*, the plaintiff's brother, died, having previously mortgaged lands to *B* by deed, containing covenants to re-convey upon six months notice of payment of the principal and interest, and that in case the estate should be sold, *B* should have the pre-emption; *B* got the counterpart into his hands after *A*'s death; then the plaintiff gave him six months notice that he would pay off the mortgage,

Orby v.
Trigg, 2 Eq.
Ca. Abr. 599,
24.
Sc. 9 Mod.
Ca. in Law
and Eq. 2.

mortgage, which he refused to accept; upon which, the plaintiff exhibited his bill for a reconveyance of the estate, having entered into articles for the sale of it. *B*, in his answer, insisted on the covenant for pre-emption; but it appearing that neither the plaintiff or purchaser knew any thing of this covenant, the counterpart of the deed having been in *B*'s custody; that the plaintiff, on application for it, had been denied it, the mortgagee insisting only on payment, alledging the security was too narrow for the money lent, and threatening to foreclose, never having mentioned his claim to pre-emption until after the estate was sold; it was said, he ought not to set it up to the prejudice of the purchaser, having had time to claim it, if he had pleased, before the estate was sold; and it was decreed accordingly.

A distinction hath been made by the court of Chancery, between contracts originally founded upon lending and borrowing money, with an agreement for a purchase in a certain event, and cases where, after a mortgage, a new agreement hath been entered into and executed by the parties for an absolute purchase, although there be a subsequent declaration that the mortgagor may have his estate upon payment of interest, principal,

Barrel v.
Sabine, 1
Vern. 268.

pal, and costs; or, where a release of the equity of redemption is given with a collateral agreement to re-convey, upon repayment of the purchase-money; and, in the latter cases, it hath been determined that no repurchase shall be had, unless upon strict performance of the conditions stipulated.

Cotterel v.
Purchase, Ca.
in Eq. Temp.
Lord Talbot,
61.

Thus where *A*, a joint-tenant with *B*, her sister, made an absolute conveyance to *C* in fee for 104*l.* which was admitted to be intended only as a mortgage; some time after, in 1708, those deeds were cancelled, and then *A*, in consideration of 184*l.* (including the 104*l.* paid by *C*) conveyed the estate *ut supra*, but with a farther covenant not to agree to any partition without *C*'s consent. *B* was in possession till 1710, when *C*, ejecting her out of the moiety, enjoyed it quietly till 1726, at which time *A* brought a bill for redemption, to which *C* pleaded himself an absolute purchaser. The receipts given for the money, mentioned it to be purchase-money. In 1710, there was an agreement that *A* might have the estate again, if desired, on payment of principal, interest, and charges. It was first heard before the Master of the Rolls, who dismissed the bill. Afterwards it came on before Lord Chancellor *Talbot*, who observed the case was

very

very dark ; the first deed was admitted to be a mortgage, the second was made in the same manner, excepting the covenant respecting the partition, which was the darkest part of the case ; for to suppose that it was an absolute conveyance, and to take a covenant from one who had nothing to do with the estate, made both the covenant and parties vague and ridiculous ; but that it would be equally so, if the deed was supposed not to be an actual conveyance, so that it was of no great weight, and ought to be laid out of the question ; that he was inclined, upon the whole, to think the conveyance in 1708, was at first an absolute conveyance. The agreement, in 1710, for the repurchase, shewed it was not redeemable at first ; the acquiescence of sixteen years under C's possession, was a strong evidence of it ; and his Lordship, upon the circumstances of the case, affirmed his Honor's decree.

So, where lands in *Wales* were mortgaged for 400*l.* and afterwards, neither principal nor interest being paid at the time limited, the mortgagee brought an ejectment, got possession of the premises, and then obtained a release of the equity of redemption from the mortgagor, upon payment of 350*l.* more ; a note was given at the time of executing

Endsworth v.
Griffith,
15 Vin. Abr.
468, Pl. 18.
2 Eq. Ca. Abr.
595. Pl. 6.
1 Brown's
Parl. Ca. 149.

executing the release, that the releasee, on payment of the 750*l.* and all charges of repairs within a year by the releasor, should sell and convey to him the premises. Payment having been neglected for sixteen years, redemption was not allowed, the note being considered as an original agreement between the parties to sell and convey the premises upon the terms therein mentioned, but not that the releasor should be at liberty to redeem the same.

We must remark here also, that if the transaction passes between persons of the same family, and there appears upon the face of the contract, or in proof, an intention, in a certain event, to benefit the lender of the money, the contract will be considered as wearing a kind of double aspect, and the court will support the intention of the parties to turn a mortgage into a purchase in a certain event, though contrary to the general rule; for, in such case, there is no danger of any fraud or practice against the mortgagor, which is the mischief intended to be prevented by a strict observance of the maxim in equity, *that an estate cannot be a mortgage at one time, and an absolute purchase at another.*

Thus,

Thus, where one, seised in fee, in consideration of 1000*l.* paid to him by a person that married his kinswoman, conveyed to him and his heirs, and took a re-demise for ninety-nine years, if he should live so long, with a covenant therein, that if he should pay 1000*l.* with the interest that should be due for the same at any time *during his life*, the mortgagee should re-convey to him and his heirs; and, *if the mortgagor did not pay the money, then his heirs, &c. should have no power to redeem*; the mortgagor died, the money not being paid. His heir preferred a bill to redeem, and, at first, it was so decreed by Lord Nottingham. Afterwards the cause came on again, upon a demurrer to a bill of review, to reverse that decree. It was argued for the demurrer, that an estate could not be a mortgage at one time, and afterwards become an absolute purchase by one and the same deed; that the mortgagee, in this case, had a proper remedy, and might have made his estate absolute in a legal course, by exhibiting a bill to foreclose; but the court inclined to reverse the decree.

Bonham v.
Newcomb,
2 Vent. 264,
1 Vern. 7,
214, 232.
2 Ca. Ch. 58.

And this cause coming on *de integro*, the Lord Keeper adhered to his former opinion, that there ought to be no redemption; principally, because it was *proved in the cause*,

1 Vern. 232.

that the design of the mortgagor was to make a settlement by this mortgage, and that he intended a kindness and benefit to the mortgagee, in case he should not think fit to redeem in his life-time. And as there was an express covenant that the mortgagor might redeem at any time during his life, his Lordship thought he could not in equity have been debarred of that privilege, for, by a bill to foreclose a man, you could only bar him of his equitable title when his estate, in law, was become forfeited; but when he had a continuing title at law, as in this case, by an express proviso that he might redeem at any time during life, he thought equity could not have debarred him of that privilege. And, therefore, seeing the mortgagee, in the present case, could not have compelled the mortgagor to redeem, and that the mortgagor might have lived so long as to have made it an ill bargain, then, when by contingency it happened to be a good bargain, there was no reason to raise an equity to take the estate from the mortgagee, especially where there was a kindness and benefit intended him by the mortgagor.— And Lord *Nottingham's* decree was reversed, and the reversal afterwards affirmed in parliament held 1 & 2 *W. and M.*

So,

So, if a man borrows money of his brother, and agrees to make him a mortgage, and, that if he has no issue male, he shall have the land ; such an agreement, *made out by proof*, might be decreed in equity. 1 Vern. 193.

Another exception hath been made to this general rule, namely, where a conditional conveyance is made, to be void upon payment of a sum certain, within a stipulated time, in contemplation of a settlement, or family provision. As where *A*, seised of a copyhold in fee, surrendered it, upon his marriage, to the use of himself and his wife in special tail, remainder to her in fee, upon condition that, if he paid 50*l.* at a day certain, to the daughter that the wife had, then the whole surrender would be void.—The day elapsed, the 50*l.* not paid, and the husband died without issue. On a bill to redeem, brought by his heir against a purchaser from the wife, the defendant pleaded that he was a purchaser for a valuable consideration without notice ; and it was resolved, that this was not originally designed for a mortgage, but that the party, by settling it thus, had left it in his election, either to perform the condition by paying the money, or to let the settlement stand ;

King v.
Bromley,
2 Eq. Ca. Abr.
595, 8.

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he had chosen the latter, and the plea was allowed.

Sir Nich.
Wolston v.
Aston,
Hardress 511.

So, where one, upon his marriage, covenanted that his wife should be paid 1000*l.* within two years after his death, and for performance thereof, entered into a statute; but who, prior to the covenant and statute, had mortgaged part of the lands for 500*l.* for certain years. Afterwards he devised these lands to his wife and her heirs, if the 1000*l.* were not paid to her, according to the marriage-covenant, she paying off the said 500*l.* He died, leaving his wife executrix, to whose hands assets came; the 1000*l.* not being paid to the wife, she paid off the 500*l.* and had the mortgage lands assigned to her. She then conveyed over the mortgage-lands in fee by fine and deed. The question was, whether the heir of the covenantor could redeem, paying the 1000*l.* and the 500*l.* with interest upon discount of the profits? And the Lord Chief Baron was of opinion he could not; for the devise to the wife was absolute, if the 1000*l.* were not paid at the time appointed.

A distinction hath been likewise taken, between mortgages, and defeazable purchases, subject to re-purchases within a *time limited,*

limited, where the interest is taken by way of rent-charge; for, in the latter cases, the stipulations made between the parties must be strictly adhered to, or the estate of the grantee will become absolute. If it were otherwise, it would make property very precarious; for if, after the term agreed upon, the estate were to be considered as a redeemable interest, then it would be only a personal estate; but, if considered as absolute, it would be a freehold, and must be conveyed as such. This would create great confusion, and render it very difficult for persons either to dispose of such property, or to settle what kind of conveyance was proper.

Thus where *I S* granted a rent-charge in fee of 48*l.* a year to *B* upon condition, that if *I S* should, at any time, give notice to pay in the consideration-money (being 800*l.*) by instalments, *viz.* 100*l.* at the end of every six months; and should, pursuant to such notice, pay the same and interest *at any time during his life-time*, then the grant to be void. There was no covenant for *I S* to pay the money, and the rent-charge was much less than what the interest came to (interest being then 8 *per cent.*) *B* had conveyed it over after *I S*'s death to a *purchaser with collateral security* for quiet enjoyment, and

Floyer v'
Levington,
1 Will. Rep.
268.

the *purchaser* had afterwards made a marriage settlement upon it. The question was, whether it was redeemable after sixty years? And it was decreed, by Lord *Cooper*, that it was not. His Lordship observed, it was material that at the time of making the mortgage, interest was at 8 *per cent.* the rent-charge, therefore, was much less than the interest of the money; consequently the payment of the rent-charge could not be taken as the payment of the interest; that several circumstances occurred in this case, which, though each of them singly might not be of force to bar the redemption, yet, joined together, were strong enough to prevail over it; that *the mortgagee seemed to have allowed a consideration* for purchasing the equity of redemption after the death of the mortgagor; first, by taking the rent of 48*l.* *per annum*; secondly, by agreeing to have his money by instalments; thirdly, by leaving it only at the election of the mortgagor, whether he would redeem or not; that there could be no reason given why such a contingent right of redemption might not, upon fair and equitable terms, be purchased; that length of time, where so great as in the present case, was a good bar of redemption of a rent-charge, as well as of land; and
that

that the mortgagor was not bound to pay the money by any covenant.

The Reporter observes upon the last case, that it was thought length of time was the principal objection to the redemption; but, in the case of *Mellor v. Lees*, which came on ² Atk. 494. before Lord Chancellor *Hardwicke*, upon an appeal from the Rolls, the doctrine that such limited agreements for redemption, or rather repurchase, were legal, was confirmed.

In this case a mortgage was made of an estate by the plaintiff's grandfather, *Thomas Mellor*, in 1689, to *John* and *James Whitehead*; the *Whiteheads* afterwards, on the 5th of *June* 1689, mortgaged the same estate to *Cartwright* and *Haywood*, and their heirs, for securing 200*l.* to which *Thomas* and his son, *John Mellor*, were parties; and *Cartwright* and *Haywood*, in order to secure themselves the interest, made a lease to the plaintiff's father, and to his assigns, dated the 12th of *June* 1689, for five thousand years, at the rate of 12*l.* a year, for the three first years, and 10*l.* a year for the remainder of the term; and if, in the space of three years, the 200*l.* was paid with interest, then the premises were to be re-conveyed.

Receipts had been given sometimes for interest, and sometimes for a rent-charge; the last receipt was in 1730. The 200*l.* lent was money left under one *Sutton's* will in 1687, and directed to be laid out in the purchase of lands in fee, in *Lancashire* or *Cheshire*; the rents to be applied towards clothing twenty-four aged and needy house-keepers. The estate, at the time of the mortgage, was worth 500*l.* only, but was now valued at 900*l.* The plaintiff, on the 20th of *January* 1738, had given notice that he would pay in the money; but the defendant, a new trustee of the charity, had refused to take it, insisting that it was an absolute purchase. And it was so decreed by *Fortescue*, Master of the Rolls, from which decree there was now an appeal made to the Chancellor.

His Lordship said there were two general questions in the case. First, as to the contract, whether the transaction was, in its nature, a mortgage, or a defeazable purchase subject to a re-purchase? Secondly, whether, if originally intended as a mortgage, length of time would not be a bar to redeeming?

As to the first, there was a difference between such an agreement as this, which
related

related to a rent-charge issuing out of land, and an agreement which related to the land itself. So also the case of creating a rent-charge, and mortgaging a rent-charge, were different considerations ; when a man took a mortgage, the produce of the estate was not only barely adequate to the interest, or even to a perpetual payment of the interest, but, generally, was double the value of the interest of the money lent. If any fetters had been laid upon redeeming the mortgaged estate, *by an original agreement* either in the mortgage-deed, or in a separate deed, it would not have availed, *where it was done with a design to wrest the estate fraudulently out of the hands of the mortgagor* : but what fraud or inconvenience was there in this case ? The land itself was not parted with, but it was merely selling a rent-charge strictly adequate to the consideration given ; and, instead of having a chance for the whole estate, the lender was contented to buy the interest for ever by way of rent-charge,

As to the particular agreement, his Lordship said, that from that, and from the articles made in 1689, it appeared plainly to be the intention of the parties that, after the end of three years, the interest should be changed

changed into a rent-charge, and be irredeemable.

His Lordship farther said, it was material, that the money lent to the charity and lent, was not to be laid out at interest, but to be invested in land in fee simple; so that the trustees, being under an inability of treating in the common way, put it in this method; and the will itself laid the foundation of the transaction, and cleared the defendants from the suggestion of oppression and imposition.

1 Will. 271.

Likewise an essential circumstance in this case was, that there was no covenant in the deed for re-payment of the mortgage-money; for though, in general, this was no rule against redemptions, here it was explanatory of the whole scheme and intention of the parties. He did not found his opinion singly upon the nature of the contract, but also upon the great length of time elapsed, being 48 years. Not that the general rule of the court (not to suffer a common and plain mortgage to be redeemed after the mortgagee had been in reception of the rents and profits a considerable time, because it would be making him bailiff to the mortgagor and subject to an account) applied forcibly in this case of a rent-charge; there would

would be no such inconvenience, for the person might easily account; but the value of property was greatly altered since 1689, therefore more might have been said, if the redemption had been proposed sooner. His Lordship concluded by saying, the bill was properly dismissed at the Rolls, not so much upon general rules, as upon the particular circumstances of the case, and of the similitude between it and that of *Floyer v. Levington*. Supra, Page 35.

It is to be observed, upon the reasoning in this case, that although Lord *Hardwicke* stated the length of time, as an additional reason in support of this decree, yet he only urged it as to its operation in altering the value of the property, and not as a presumption of the grantor's having abandoned his right of redemption, if he had ever been intitled to it. And his Lordship principally determined upon the special circumstances of the contract, for, as he justly observed, length of time was allowed to be a good objection to redemption, because of the difficulty it laid upon the mortgagee of accounting, which, in the case of a rent-charge, did not exist. A distinction which had been taken before in the case of Lord *Widdrington v. Jennings* in Lord *Harcourt's* time, cited by Sir Widdrington
v. Jennings,
1 Will. Rep.
270.

Sir Joseph Jekyl in *Floyer and Levington*, where the court took a difference between a mortgage of a rent-charge, and of land; and allowed a redemption in the former case after eighty years.

*Tasburgh v.
Echlin et al.
& Brown's
Par. Ca. 142.*

And it seems, from the determination in the case of *Tasburgh* and *M^r Namara v. Sir Robert Echlin et al.* that such a contract respecting lands, limiting the payment of the money advanced and interest thereupon to a particular period, would be considered in the nature of a conditional purchase, and no redemption allowed thereof, after the time stipulated.

This case came before the House of Lords upon an appeal from a decree made by the Lord Chancellor of *Ireland*, in the year 1732, on the following circumstances, viz.

King *James I.* by his letters patent under the great seal, dated the 17th of *June* 1608, granted divers lands to *John King* and *John Bingley*, and their assigns, for 116 years, to commence from the 18th of *May* then last past, at a certain yearly rent. The residue of which term, by deed dated the 26th of *May* 1677, became vested in *John Tasburgh*, father of *Henry Tasburgh*, the appellant in the cause.

King

King *Charles I.* by his letters patent, dated the 25th of *March* 1647, granted the same premises to Sir *Maurice Eustace* and his heirs at a like rent, but without reciting or taking any notice of the term of 116 years. Sir *Maurice*, by his will dated the 20th of *June* 1665, devised the premises, *inter alia*, to his nephew Sir *John Eustace* in fee ; who by virtue thereof, or as heir at law of the testator, became entitled to the reversion and inheritance of the premises, expectant on the determination of the term of 116 years.

The premises being only of the clear yearly value of 200*l.* Sir *John*, in consideration of 200*l.* paid him by the said *John Tasburgh*, did by lease and release, dated the 30th and the 31st of *May* 1681, grant and convey the same to *Charles Tasburgh* and his heirs, in trust for *John Tasburgh* ; in which indenture of release there was a proviso to the following effect, *viz.* That if Sir *John Eustace*, his heirs, executors, or administrators, should pay to *Charles Tasburgh*, his executors, administrators, or assigns, at the end of five years, to be accounted from the date of the release, the sum of 200*l.* with full interest for the same, at the rate of 10*l.* *per cent. per annum*, according to the custom of the kingdom of *Ireland* ; that then it should be lawful for him and his heirs, into
the

the premises to re-enter, and the same to repossess and enjoy as in his and their former right. But if Sir *John*, his heirs, executors, or administrators, should fail in payment of the money with interest at the time limited, that then the estate of the said *Charles Tasburgh* should be absolute and indefeazable, as well in equity as in law; and that Sir *John*, his heirs and assigns, should, on failure of payment as aforesaid, be for ever debarred from all right and relief in equity, against the tenor of the said release. And Sir *John* did thereby, for himself and his heirs, release unto *Charles Tasburgh*, his heirs and assigns for ever, all his right in equity to redeem the premises, in case of failure of payment as aforesaid: and there was no covenant in the deed, on the part of the grantor, to repay the 200*l.* or the interest thereof, as is usual in mortgages.

The five years mentioned in the proviso being elapsed, and no part of the 200*l.* or the interest thereof having been paid, *John Tasburgh* (having no remedy at law to compel the payment, the estate being only a reversion expectant upon the determination of a term of which there were then 43 years unexpired) exhibited a bill, in *April* 1687, in the name of *Charles Tasburgh*, against Sir

John Eustace, setting forth the nature of the conveyance, and praying payment at a certain day, or that the conditional estate of *Charles Tasburgh* in the premises (in case it should be adjudged to be a defeazable or redeemable estate) should be made absolute to him and his heirs; and that in that case Sir *John Eustace* might be foreclosed of all right or equity of redemption of the premises, and might make farther absolute conveyances and assurances to the said *Charles Tasburgh*, according to the tenor and true meaning of the indentures of lease and release.

Sir *John* being served with a *subpœna* to answer this bill, stood out all process of contempt to a sequestration, and in *May* 1688, appeared by his Six Clerk, and prayed a commission for taking his answer in *England*, which was granted by consent. But it was ordered that, unless the same was returned by the 22d of *June* following, the cause should be set down to be heard, and the bill taken *pro confesso*. Sir *John* having neglected to answer at the time limited, farther time was given him; but he still neglecting to answer, a decree was made the 11th *December* 1688, that he should be foreclosed

closed, unless the principal, interest, and costs, were paid before the 11th *December* 1689.

Afterwards Sir *John Eustace* returned to *Ireland*, and lived until the year 1706, when he died without issue; but he never took any one step to impeach these proceedings or decree; or did he ever attempt to seek a redemption of the premises, but acquiesced under the decree for 18 years.

Henry Tasburgh, the appellant, succeeded to this estate on the death of his father, in 1691, and entered thereupon. And not imagining that, after an acquiescence of 34 years under the decree, any person would set up a claim thereto under Sir *John Eustace*, he by indenture, dated the 24th of *April* 1722, in consideration of a fine of 300*l.* demised the same to the appellant *George M'Namara* for the term of 31 years, at the clear yearly rent of 250*l.*

But the value of lands in *Ireland* rising considerably, a bill was exhibited in the Court of Chancery there, in *September* 1723, by several persons in right of their wives, (nieces and co-heiresses of Sir *John Eustace*) alledging, that the bill of foreclosure was
obtained

obtained by surprise, fraud, and imposition; and praying it might be reviewed and reversed.

Afterwards, in *April* 1729, the appellant *Henry* put in a plea and answer to this bill (which having abated, they claimed a right to revive) insisting on the title as before set forth; and farther pleading the lease and release executed, in 1681, by Sir *John Eustace*, the declaration of trust executed, by *Charles Tasburgh*, the decree of foreclosure, and the proceedings had in that cause, and the great length of time and acquiescence under that decree. And *George M^cNamara* denied notice of the respondents' title, and insisted, that he was a purchaser, for a valuable consideration, of his said term without any notice. But it was decreed, that upon the respondents paying the appellant *Henry* the principal, interest, and costs due to him, he should reconvey the same; and as to *M^cNamara*, an issue was directed to be tried, whether he, at any time, and when, had notice that the co-heiresses of Sir *John Eustace* had or claimed any and what right to the lands in question, after the lease to *King* and *Bingley* should expire.

From this decree the appeal was brought; it being insisted, on the part of the appellants, that, as the case was circumstanced, there ought to be no redemption, upon any terms whatever; it having been expressly agreed by the release in 1681, that, if the money was not paid within five years, the estate should be irredeemable; it ought therefore to be considered as a conditional purchase, and the rather, because there was no covenant to repay the money. That, as the appellant *Tasburgh*, or those under whom he claimed, could not compel payment, it ought not to have been decreed a mortgage; for, in cases of mortgages, the remedy should be reciprocal; consequently, no equity of redemption could arise or spring from the condition contained in the release; for the supposed pledge was only a reversion expectant on a long term of years, whereof no less than 43 were then to come, during which time it could yield no manner of fruit or profit. That the 200*l.* was a sufficient consideration for the absolute purchase, according to the then value of lands in *Ireland*. That the decree of the 11th *December* 1688, ought to be binding upon Sir *John Eustace*, and upon the respondents, as claiming under him. And even supposing this to be the case of a mortgage clearly
and

and undoubtedly redeemable, yet, considering the length of time that the mortgagor, and those claiming under him, had acquiesced, without demanding such redemption, and regard being had to the other circumstances of the case, no redemption ought to be decreed.

To this it was answered by the respondents, That upon the face of the deeds the transaction appeared to be a mortgage; that *John Tasburgh* understood it so to be, or he would not have brought his bill of foreclosure. That such clauses to restrain the redemption were always considered in equity as terms extorted from the necessities of the borrower, and tending to usury and oppression; that the decree in 1688 was not binding or conclusive, being obtained in the absence of of Sir *John Eustace*, without any defence, and in time of war and general confusion; it was never completed, or the account directed taken, or the order for foreclosure made absolute.— As to the length of time, it was said, that the first lease granted did not expire until 1724, which was *after* the first bill for redemption was brought; consequently *Tasburgh* could not be considered as a mortgagee in possession, till after the expiration of

that term; for, during its continuance, he was in possession as a tenant, and not as a mortgagee. Besides, Sir *John Eustace* being in *England* from the time of making the mortgage till near his death, and in extreme poverty; and his heirs at law having been under coverture or infancy from that time to the time of filing their bill in 1723, which was before the reversionary estate came into possession, no laches or delay could reasonably be imputed to them. As to *M^r Namara*, it was said to be proved by the respondents, that the premises were of the yearly value of 900*l.* and that the only consideration for his lease was a fine of 300*l.* and an annual rent of 250*l.* and that it appeared in the cause, that he had notice of the respondents title, previous to his taking the lease; and that *covenants* were inserted therein for bearing the loss, in case of an eviction; for which reasons it was hoped the appeal would be dismissed with costs.

But it was ordered and adjudged, that the proceedings, orders, and decrees therein complained of, should be reversed, and the respondents bill dismissed.

I thought it necessary to state the reasons offered by the parties to this appeal rather
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at large, because a satisfactory answer being given to the arguments of the appellants, founded upon the length of time that had elapsed since the decree for foreclosure, upon the decree itself, and upon the purchase of *McNamara*, the case appears to me to turn abstractedly upon the question of the legality or illegality of the proviso for a repurchase. And, indeed, if the order for foreclosure had even been made absolute, I apprehend it would have made no difference in the case, had the transaction been adjudged a mortgage, and the proviso been considered by the Lords as inserted with a view to restrain the equity of redemption; because, in such case, the original agreement would have been considered as fraudulent, and the artifice of adding the sanction of the court to the transaction, would only have made the conduct of the parties appear in a more criminal view.

But, in all these cases where the equity of redemption is rebutted by agreements of this kind, and the transaction is considered as a conditional purchase, the intention of the parties at the time of contracting must, I apprehend, be clearly proved or necessarily implied, from the circumstances attending it, otherwise the general rule will not be departed from.

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Attorney
Gen. v.
Meyrick,
2 Vez. 44.

It was held, in the case of the *Attorney General v Meyrick*, that a devise of a mortgage was expressly within the meaning and provision of the mortmain act, 9 Geo 2. That was an information to have a charity established, and carried into execution. The facts were, that one being in possession, under a judgment and writ of *habere facias possessionem*, of lands mortgaged to him in fee, made his will, and reciting therein that he was possessed of certain sums of money due by mortgage and other specialties, gave the money in anywise due by mortgage, notes, or otherwise, on the estate of the mortgagor, whereof he was possessed, by *habere*, &c. and all his personal estate, in trust to pay his debts, legacies, &c.; and afterwards, that the trustees should settle a place for the schooling and teaching so many poor boys, clothing them, &c. and to pay the master for such teaching, as the interest of the money he was possessed of, by securities on the estate, late of the mortgagor, would support and maintain; and he devised them all the money due on that estate, to be laid out at interest on good securities, to apply the interest thereof to the maintenance of the said school for ever. On the part of the charity it was urged, that the mortgaged premises were not devised, but only the money due
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by mortgage, and that the heir at law of the testator ought to be a trustee for the charity: that it was only a devise of the beneficial, not of the legal interest which descended to the heir: that the lands were alienable, and this was given as money, not as land. *Sed per* Master of the Rolls: The distinction made on the part of the relator, between a devise of mortgaged premises, and of the money due on mortgage, did not seem well founded. By a gift of all one's mortgages to *A*, the whole beneficial right passed to him; and were the legal interest either in the heir or executor, as it was a mortgage in fee or term for years, each would be considered as trustee for *A*, who would be permitted by the court to use their names to get the money, or make the pledged estate his own by foreclosure. If it would be so in that case, *then* it would be equally so, though the phrase used was *money due on mortgage*; in which case, unless the court construed it to pass the whole interest of the mortgagee, it would make it in effect a void devise, or, at least, put it in the power of a third person, whether the devisee should take thereby, or not. The question then was, Whether this was within the mischief intended to be prevented by the statute? He was of opinion that this devise came within the express

words and plain intent thereof. The design of the act was to lay a restraint on every method whereby land might possibly come into such hands, unless by the manner therein prescribed: the parliament had therefore, by express words, taken in this case of a mortgage in the third clause, the words of which, if they did not extend to mortgages, he was at a loss to know for what purpose they were put in: the meaning was, that you should not give to a charitable use, that which was, or might be, charged on land, though not so at the time of the gift. Though by the first clause securities for money were allowed to be given under the requisites of the act, yet the subsequent words of that clause afforded an argument, that mortgages *affecting lands actually* at the time of the gift, would not come within the meaning, as there might be other securities for money not immediate liens on lands, as debts, bonds, &c. He should think, on the first clause, mortgages were prohibited: but if doubtful on the first clause, the words of the third clause took them in expressly. The information, therefore, must be dismissed.

Vaughan v.
Farrer,
2 Vez. 183.

But Lord *Hardwicke* took a distinction, in the case of *Vaughan v. Farrer*, between that case, where a devise was of the *residue* of a real and

and personal estate to a charity, and the preceding case, in which there was a *specific* legacy of the whole personal estate, and of the mortgage *particularly* by name, which the trustees *particularly* claimed; and was of opinion, that such a devise of the *residue* to a charity would be good, although the devisor was possessed of mortgages; but it did not then appear to the court, that there were mortgages.

In the case of *Jason v. Eyres* it is said, divers proofs touching parol declarations were offered and read on both sides, which the court would take no notice of; but this point is now settled otherwise, mortgages not being considered as conveyances of land within the statute of frauds. Thus, in the case of *Richards v. Sims*, where the question was, whether parol evidence could be given of the mortgagees having discharged the mortgagor from the debt; the fact, as sworn, was, that when the mortgagor went to the house of the mortgagee with the box of writings, wherein the mortgage and the bond were, and offered them to the mortgagee, the mortgagee put the deeds back and said, *take back your writings, I freely forgive you the debt*; and then, speaking to the mortgagor's mother, who was present,

Bonham, v. Newcomb,
supra p. 31,
et vide 2 Bur.
978.

Richards v. Simms,
Barnard. 90.

lent, said, *I always told you I would be kind to your son; now you see I am as good as my word.* The Lord Chancellor as to this evidence, observed, the rule upon this head was the same in law and in equity; and his opinion was, that it might be admitted. The statute indeed laid down a very strict but proper rule, relating to real estates, *viz.* that “*no interest, any longer than for three years, should pass in them without writings nor any trust in them for a longer time, unless the trust arose by operation of law.*” The same rule by that statute related to the devising of real estates; but, in all these cases, there was a difference both in law and equity, between absolute estates in fee and for a term of years, and conditional estates for securing the payment of a sum or sums of money. In the case of absolute estates, it could not be admitted, that parol evidence of the gift of deeds should convey the lands themselves; but, where a mortgage was made of an estate, that was only considered as a security for money due, the land there was the accident attending upon the money, and when the debt was discharged, the interest in the land followed of course. In law, the interest in the land was thereby defeated; in equity, a trust arose for the benefit of the mortgagor. In an ejectment
 where

where a title was made under a mortgage, if evidence was given that the debt was satisfied, this was considered as defeating the estate which the mortgagee had in the land; and in such cases, especially where the mortgage was ancient, the court would presume that the money was paid at the day, and would direct the jury to give their verdict accordingly, unless it clearly appeared that the money could not be paid at the day; no writing was in these cases necessary, which shewed, that, even at law, the debt was considered as the principal, and the land only the accident. Equity went farther, and in all cases said that, when the debt appeared to be satisfied, there arose a trust by operation of law for the benefit of the mortgagor. This case was within the exception in the statute of frauds, which had been mentioned, as to trusts arising by operation of law; and in these sort of cases the court received any kind of evidence of payment: therefore, if a mortgage was made by one partner to another, and the mortgagor agreed with the mortgagee that he should take a certain part of the profits of the partnership in discharge of the mortgage, that of itself would discharge it. Here was a mortgage made, and a bond at the same time entered into for performance of

cove-

covenants. Suppose an obligee delivered up a bond with intent to discharge a debt, the debt would certainly be thereby discharged; and, if the bond was discharged in the present case, the mortgage would be discharged with it; his Lordship directed an issue to try whether these expressions were used or not, the evidence as to this point being doubtful.

Hampton v.
Spencer,
et c. cont.
2 Vern. 288.

So where *H*, in consideration of 80*l.* paid by the defendant *S*, conveyed an house and surrendered a copyhold estate to him and his heirs; the bill was for a reconveyance on payment of the remainder, due of the 80*l.* and interest. The defendant, by answer, insisted, that the conveyance was absolute to him and his heirs, without any proviso, clause, or agreement that the plaintiff might redeem; but confessed it was in trust that, after the 80*l.* with interest was paid, the defendant *should stand seised for the benefit of the plaintiff's wife and children*, although no such trust was declared in writing. For the plaintiff it was insisted, that he, having replied to the defendant's answer, *who had not made any proof of such pretended trust*, was bound by his confession, *that he was not to have the estate absolutely to himself*, and that no regard ought to be had to the matter
set

set forth in avoidance of the plaintiff's demand, because the defendant had not proved it. *But the court decreed the trust for the benefit of the wife and children.*

But in the case of *Robinson v. Gee*, Lord *Hardwicke* was of opinion, parol evidence could not be admitted as to an agreement between *co-mortgagors*, to charge the lands otherwise than they would have been affected by the operation of law upon the contract.

*Robinson v.
Gee,
1 Vez. 251.*

That case, as to the point in question, was thus: *A*, tenant in tail, remainder to his brother in tail with other remainders, wanting to raise money to discharge debts on the estate, proposed to *B* to join in a mortgage, which was agreed to and done; both joined in the bond, but *A* being first named, received the money. The remainder being vested in possession in *B*, on the death of *A*, the creditors of *A* brought a bill to turn the mortgage and interest on the estate of *B*, and to exonerate the personal estate of *A*. Parol evidence was offered of a particular agreement between the brothers that this debt should rest intirely upon the estate of *B*: this was objected to, as not being proper evidence within the statute of frauds, be-
cause

1 Vez. 253.

Brown
v. Selwin
Case temp.
Talbot 240.
S. C. 4.
Brown's
Parl. Ca. 179.
Forrester 243.
2 Eq. Abr.
464.

Vid. 1. Atk.
386. Taylor
v. Taylor,

cause only parol; whereas, this being a real right annexed to a real estate, such an agreement could not be proved without writing. Lord *Hardwicke* observed, as to this part of the case, that, as to the parol evidence, it was not necessary to give an absolute opinion, but he doubted whether it would be good. This was certainly a kind of real right, being to affect a real estate *in all events* contrary to the writing, and to rebut the equity. Before the case of *Brown v. Selwin*, it was held in several cases, that parol evidence might be given to rebut an equity, although relating to a real right; but, in that which was the case of a will, the Lords held otherwise: from which determination, going farther than any had ever gone before, his Lordship did indeed differ in opinion; his Lordship said the equity *there* was, that two persons being made executors and *residuary legatees*, and one of them being indebted to the testator to the amount of 3000*l.* the latter insisted his debt was thereby extinguished; the former affirmed the contrary, and claimed a moiety of the 3000*l.* as one of the *residuary legatees*. The former offered parol proof of his being made an executor by the testator with intent to extinguish that debt, but the Lords would not suffer it to be read; and his Lordship said this was a stronger case than

than that then under consideration ; but, even supposing this evidence might be read, his Lordship thought it was not sufficient to prove what it was brought for.

We must here observe the evident distinction between the last case and those of *Richards* and *Symms*, and *Hampton* and *Spencer* ; and also between these cases and that of *Brown* and *Selwin*, referred to by Lord *Hardwicke* ; which last, I apprehend, turned upon a different point, and was not governed by the statute of frauds ; for, in the cases of *Richards* and *Symms*, and *Hampton* and *Spencer*, the question, as to admission of parol evidence, arose between the mortgagors and mortgagees, or their representatives ; but, in the last case, the question was between the creditors of a joint-mortgagor and his co-mortgagor, the latter of whom, in law, independant of any parol agreement, was considered only as a collateral security ; but, if the parol agreement had been admitted in evidence, it would have charged the estate of the latter, which would not otherwise have been affected, if the deceased mortgagor had left assets. Consequently, the ground of admitting parol evidence in the former case does not exist in the latter ; for the court, in the former case, considered the

essence of the contract as a negotiation for a loan, the land as pledged collaterally to secure the payment of it; that, therefore, any evidence which explained, impeached, or discharged the personal contract for a loan, affected the land, not directly, but *consequentially* only: *ex. gra.* if the money borrowed was paid, or the debt discharged, the lien upon the land, which was only to secure that, determined; in equity, therefore, it was from thenceforth held in trust for the mortgagor. But in the case of *Robinson and Gee*, the evidence offered went directly to affect the lands in the hands of the surviving mortgagor with a parol agreement, contrary to the statute of frauds, made in contemplation of a mortgage it is true, but totally irrelative to the contract for the loan between the mortgagor and mortgagee, to which, in the former case, the evidence offered was considered to apply directly, and by affecting that, to affect the land indirectly and consequentially: and, in the case of *Brown and Selwin*, the object was to procure the admission of parol evidence to shew that the testator intended words in his will to operate otherwise than they would do, if taken according to their ordinary import, contrary to a settled rule of law; that where a will or instrument explains itself, no evidence

2 Mod. 11.
Ibid. 159.
Cheyney's
case, 5 Co. 67.
2 Vern. 337.
Ibid. 625.



dence out of it shall be admitted; but the intention shall be collected from the written words; for, even in the case of an ambiguity on the face of a deed or will, it is clear law, that it can never be helped by averment; because the law will not couple and mingle matter of specialty, which is of higher nature, with matter of averment which is of inferior account; for that would be to make all deeds doubtful and subject to averments, and so, in effect, things to pass without deed, which the law appoints shall not pass but by deed. And, therefore, if a man give land in tail (though it be by will) the remainder in tail, and add a proviso to restrain alienation and create a perpetuity; it cannot be averred and proved, upon the ambiguity of the reference in this clause, that the intent of the devisor was, that the restraint should go only to him in remainder and the heirs of his body, and that the tenant in tail in possession was meant to be at large; it being a fixed maxim, that all ambiguity of words arising from matter within a deed or instrument, may be holpen by construction, or in some cases by election, but never by averment.

Indeed, there are cases in which parol evidence is admitted to shew the intention of

a testator or deviser ; but those cases are *not* where the ambiguity appears upon the deed or instrument, but where there is some collateral matter out of the deed which gives rise to it. As, where a man bequeaths a legacy, or devises an estate to γS , the son of N ; and N has two sons of that name ; it is clear, upon the face of the will, that the donor meant a benefit to γS , the son of N ; yet an ambiguity arises out of the deed, from N 's having two sons of that name, that renders it doubtful which of them was intended to be benefited ; to remove which doubt, parol evidence may be admitted.

Docksey v.
Docksey, wid.
and executrix,
1 Brown's
Parl. Ca. 324.
2 Eq. Ca. Abr.
115. Ca. 4,
130. c. 8.
307. c. 1.
Duchess of
Beaufort v.
Lady Gran-
ville, et al.
1 Brown's
Parl. Ca. 305.
Sc. 1 Wms.
114.
Sc. 2 Vern.
648.

So, where a man gave his wife a legacy of 1000*l.* and, as to the residue of his real estate (except one close, in his will bequeathed to a charity) devised it to her and her heirs, in trust to sell the same, or so much thereof as should be needful, for payment of his debts and legacies ; and also gave all his personal estate to her towards payment of his debts and legacies, and made her executrix ; the question was, whether here was an implied or resulting trust in the executrix, as to the residue after his *debts* and *legacies* paid, for the benefit of the heir ; and parol evidence was admitted to shew that it was the testator's intention

intention, this should be a beneficial devise to the wife and executrix.

It is observable in this, as in the preceding case, that the ambiguity arises from a circumstance out of the will, and not upon the face of it, *viz.* the wife's being capable of taking the bequests given by the testator in two capacities, as legatee to her own use, and as executrix in trust for the next of kin; and it being doubtful which way she was intended to take by the testator, because it was, *prima facie*, reasonable to presume he would not have given her part as a legatee, if he had meant to give her the whole residue beneficially as executrix, for the latter bequest would have involved in it the former; therefore, as there was no doubt but that she took the whole by the will, the only question was, in what capacity she took it? And it is like a bequest of 50*l.* to *J S*, and 100*l.* to *J S*, sons of *A B*; in which case, there can be no doubt but parol evidence would be admitted to prove which son was meant to have the greater and which the lesser legacy; the only difference being, that, in the latter case, the bequest would be to two persons in their natural capacities; whereas, in the former, it is to one person capable of taking

in two distinct capacities, the one natural, the other artificial.

But in the case of *Brown* and *Selwin*, there was a plain and express devise of a moiety of every part of the testator's personal estate, not before disposed of, to the co-executor, *of which* the debt to the testator was indisputably part. Therefore no doubt arose, as to the bequest, by matter out of the will; but the intent was to destroy the force of the written will, and overturn the plain words of it by parol evidence only; and not to obviate or take off an implication, which might or might not take place, and yet the words of the will have their force and operation; nor was it to answer any rule or construction of equity arising upon, or consistent with the words of the will, but to control and take away a plain devise and express gift to the co-executor.

2 Vern. 506.

2 Freem. 284.

2 Will. 620.

2 Eq. Ca. Abr.

482.

1 Vez. 251.

Nor do I apprehend that either of these cases clashes with the resolutions that have been made, as to admitting parol evidence on agreements respecting lands; those cases depending upon another principle, *viz.* that of the jurisdiction of equity where there is fraud. As where an agreement for a mortgage was drawn by the mortgagee, the mortgagor

mortgagor being able to write his mark only, and the mortgagee omitted to insert a covenant for redemption; in which case, on a bill to foreclose, the court permitted the mortgagor to read evidence to show the omission.

³ Atk. 389.
Prec. Chan. 104.

So, where a mortgage was drawn in two deeds, one an absolute conveyance, the other a defeazance, and the mortgage omitted to execute the defeazance, the mortgagor was permitted to shew the mistake.

² Atk. 389.
Prec. Ch. 526.

Again, where an absolute conveyance was made for a sum of money, and the person to whom it was made, instead of entering and receiving the profits, demanded interest for his money and had it paid him; this was admitted as evidence to explain the nature of the conveyance.

Ibid.

For, in such cases, the proof offered is not considered as a variation of the agreement, but explanatory only of what it was meant to have been; and the allowing any other construction upon the statute of frauds and perjuries, would be to make it a guard and protection to fraud, instead of a security against it, as was the intention of it.

Hampton v.
Spencer,
supra 50.

Another exception likewise deserves our attention in speaking of this statute, and that is, in cases of secret trusts of estates that do not appear upon the face of the deeds whereby they are conveyed, but are admitted by the trustee; for such cases, being out of the mischief, are considered, in equity, as not having been in contemplation of the legislature on passing that statute.

Newton v.
Preston, Pre.
Chan. 103.

Where one had made a mortgage in fee to *A*, and it was expressed to be in consideration of 700*l.* paid by *B*, and *C* pretended the money was advanced by *D*, his wife's first husband, and belonged to her as his executrix. On a bill of inter-pleader, filed to determine to whom the money should be paid, the question was, whether *C* should be admitted to read the examination of his witnesses, to prove his wife's interest in the mortgage-money, upon the ground that this was a trust which arose by implication of law, and was excepted out of the statute; but it was contended, on the other side, that this imported to be a mortgage for money paid by *A*, and that though a trust, which resulted by implication of law, was out of the statute, yet that trust must arise upon the face of the deed itself, and that if enquiry was made, upon parol proof, whose money
it

it was, this was in the teeth of the statute; and the case of *Kirk and Webb* was cited, wherein it was decreed, that an estate cannot be made a trust, by proving the money laid out upon it, to be such an one or such an one's. *Sed per Justice Powell*, I will not hinder you from reading, for though, at law, it is not to be allowed, where a jury may be inveigled by that which is not proper evidence, yet here is no such danger. And the proofs were read, but the justice would not decree the trust.

C A P. VII.

Of the Interest of a Mortgagor in the
Premises mortgaged by him.

2 Blackst.
Comm. 358.

AS soon as the estate of the mortgagee is created, which is now done either by lease and release, bargain and sale, or frequently by creation of a term for years in the premises, he may immediately enter upon the lands, but subject to be dispossessed upon performance of the condition, by payment of the mortgage-money, at the day limited. The usual way, therefore, as hath been said, is to agree that the mortgagor shall hold the land till the day assigned for payment, and that the mortgagee shall not intermeddle with the possession until default therein. And, in case of failure, whereby the estate becomes absolute, the mortgagee may enter upon it, and take possession,

without any possibility, at law, of being afterwards evicted by the mortgagor.

Some doubts have arisen, what estate the mortgagor has in the land from the time of making the mortgage, under such an agreement that the mortgagee shall not intermeddle with the possession until default of payment; whether he be lessee for so many years, or only in as tenant at will, or by sufferance,

And, in the case of *Powseley and Blackman*, Powseley v. Blackman, 2 Cro. 659. where a mortgage was made by bargain and sale, with a proviso and agreement between the parties, that the mortgagee, his heirs, or assigns, should not intermeddle with the actual possession of the premises, or perception of the rents thereof, until default of payment, which was to be made at the distance of some years. It was held by the court, that he was tenant at will; a distinction being taken between this agreement, and an agreement with the mortgagee that he should enjoy it during those years; for 5 H. 7. 1. the latter would have amounted to a lease 21 H. 7. 36, for years.

But although, *prima facie*, there is a resemblance between the estate of a mortgagor

gagor left in possession of the premises under such an agreement or otherwise, and a tenancy at will; yet, upon a minute and accurate inspection, a clear distinction will be found between these interests; and also between the case of a mortgagor in actual possession, and one who under-lets to tenants; for, by the agreement understood between the mortgagors and mortgagees, the latter stipulate to receive interest, the former to keep possession; but no rent is reserved from the mortgagor, nor is he entitled to notice to quit; he hath not even a right to the emblements, each of which are properties appertaining to a tenancy at will in the strict sense of the word; and the reason is, because, in this case, the *crop* as well as the land, is a security for the debt.

But, in both cases, even the similitude ceases, if there be an under-tenant; for there can be no such thing as an under-tenant to a tenant at will; such demise being, in itself, a desertion, which, in law, amounts to a determination of the will.

² Cro. 660.
³ Ibid. 303,
304, 305.

In such case, it seems, the mortgagee may consider the mortgagor as a disseisor, and his lessee as a wrong-doer or not, at his election.

If

If the mortgagee permits the lessee to enjoy his lease, the mortgagor may, from thenceforth, be considered as a receiver of the rent, or, in some sort, a trustee for the mortgagee, who may at any time, countermand the implied authority, by giving notice to the tenant not to pay the rent to the mortgagor any longer. 1 Atk. 606.

But, if the mortgagor elects the other alternative, the lessee may be turned out by an ejectment, he being in under a person who had no power to under-let, but subject to eviction by the mortgagee.

And so it was held, by the Court of King's Bench, in the case of *Keech*, lessee of *Warne*, against *Hall* and another; where an ejectment was brought for a warehouse in *London*, by a mortgagee, against a lessee under a lease in writing for seven years, made after the date of the mortgage by the mortgagor, who had continued in possession; the lease was at a rack rent. The mortgagee had not notice of the lease, nor the lessee notice of the mortgage. The defendant offered to attorn to the mortgagee before the ejectment was brought; the plaintiff was willing to suffer the defendant to redeem. There was no notice to quit, so that, although the written lease

Keech lessee
of *Warne*
against *Hall*
and another.
Douglas's
Rep. 21.

lease was bad, yet if the lessee was to be considered as tenant at will from year to year by construction, the plaintiff's action must fail. The question was, whether by the agreement understood between the mortgagors and mortgagees, which was, that the latter should receive interests, and the former keep possession, the mortgagee had given an implied authority to the mortgagor to let from year to year at a rack rent, or, whether he might not treat the defendant as a trespasser, and wrong-doer? And Lord *Mansfield* said, in delivering the opinion of the court, that on full consideration, they were all clearly of opinion, that there was no inference of fraud or consent against the mortgagee, to prevent him from considering the lessee as a wrong-doer. It was rightly admitted, that if the mortgagee had encouraged the tenant to lay out money, he could not maintain this action; but here the question turned upon the agreement between the mortgagor and mortgagee. When the mortgagor was left in possession, the true inference to be drawn was an agreement that he should possess the premises at will *in the strictest sense*; and therefore no notice was given him to quit; and he was not entitled to reap the crop, as other tenants at will were, because all was liable to the debt, on payment of which

which, the mortgagee's title ceased. The mortgagor had no power, express or implied, to let leases not subject to every circumstance of the mortgage. If, by implication, the mortgagor had such a power, it must go to a great extent, to leases where a fine was taken on a renewal for lives. The tenant stood exactly in the situation of the mortgagor. The possession of the mortgagor could not be considered as holding out a false appearance. It did not induce a belief that there was no mortgage, for it was the nature of the transaction, that the mortgagor should continue in possession. Whoever wanted to be secure when he took a lease, should inquire after and examine the title-deeds. In practice indeed, especially in the case of great estates, that was not often done, because the tenant relied on the honor of his landlord ; but whenever one of two innocent persons must be a loser, the rule was *qui prior est tempore, potior est jure*. If one must suffer, it must be he who had not used due diligence in looking into the title. It was said at the bar, that if the plaintiff, in a case like this, could recover, he would also be intitled to the mesne profits from the tenant in an action of trespass ; which would be a manifest hardship and injustice, as the tenant would then pay the rent twice. His lordship

ship gave no opinion on that point, but there might be a distinction; for the mortgagor might be considered as receiving the rents in order to pay the interest, by an implied authority from the mortgagee till he determined his will. As to the lessee's right to reap the corn, which he might have sown previous to the determination of the will, that point did not arise in this case, the ejectment being for a warehouse; but however that might be no bar to the mortgagee's recovering in ejectment, it would only give the lessee right of ingress and egress to take the crop; as to which, with regard to tenants at will, the text of *Littleton* was clear.

But there seems to be no occasion, in this case, for any implication of an authority from the mortgagee to the mortgagor to receive the rents and profits. For although the possession of the lessee of the mortgagor, under a lease from him, will make him a wrong-doer as to the mortgagee, his lessor being, as to the mortgagee, a disseisor, and consequently incapable of conveying a good title as against the mortgagee: yet, I apprehend, the lessee will not be in a worse case than a tenant under a disseisor, which, by granting the under-lease, the mortgagor hath made himself at the election of the mortgagee.

gagee. And a distinction hath been taken Lifford's case
11 Co. 31. between the case of the disseisor, and that of him who comes in under the disseisor by title; for if a man be disseised, and the disseisor, during the disseisin, cuts down the trees, or grass, or the corn, growing upon the land, and afterwards the disseisee re-enters, the disseisee shall have an action of trespass against him *vi et armis* for the trees, grass, corn, &c. for, after his regress, the law, as to the disseisor and his servants, supposes the freehold always continued in the disseisee. But, if the disseisor makes a feofment in fee, gift in tail, lease for life, or years, and afterwards the disseisee re-enters, he shall not have trespass *vi et armis*, against those who come in by title; for this fiction of the law, that the freehold continued always in the disseisee, shall not have relation to make him, who comes in by title, a wrong doer *vi et armis*, because, *in fictione juris semper equitas existit*. But, in such case, the disseisee shall recover all the mesne profits against the disseisor, in the same manner as the disseisee should recover in an assize at the common law before the statute of *Gloucester, cap. 1.* damages only against the disseisor: besides, it is to be presumed, that he who comes in by title has given some recompence to the disseisor,

disseisor, and that the lessee has paid rent to him or other consideration, and therefore, in reason, the disseisor is to be charged with the whole.

But, as to the right to the emblements, a distinction is taken between tenants who have particular estates that are uncertain, defeazable by the act of the parties to the original contract, or by the act of God; and those who have particular estates uncertain, defeazable by a right *paramount*; for, in the latter case, he that hath the right paramount shall have the emblements; as although, *quoad actionem*, the law will not by a fiction make the lessee, who comes in by title, liable to punishment as a trespassor; yet, *quoad proprietatem*, the regrefs of the disseisee reverts the property in him, as well for the emblements as for the freehold itself, and equally against the feoffee or lessee of the disseisor, as against the disseisor himself. For the rule and reason of the law is, that after the regrefs of the disseisee, the law adjudges that the freehold has continued in him, which rule and reason extends as well to the emblements, as to the freehold; and, although the act of the disseisor may *alter* a man's action, yet his act cannot *take away* his action, property, or right.

And

19 H 6. 17.
38 H 6. 27.
39 H 6. 18.
Gilb. Dev.
135.

And the law is the same, if the feoffee or lessee sows the land, or cuts down trees or grass, and severs and carries away, or sells them to another. Yet, after the regrefs of the disseisee, he may take the corn, as well as the trees and grass, from whatsoever place they are carried to; for the regrefs of the disseisee has relation, as to the property, to continue the freehold against them all in the disseisee *ab initio*, nor can the carrying them off the land alter the property; and if the disseisee takes them, they shall be recovered in damages against the disseisor.

Nor do I see any ground upon which the case of a tenant under a mortgagor can be distinguished, as to the right of emblements, from any other tenant under a tortious title; for, if he be considered as a wrong-doer as to his occupation of the premises, he cannot be considered in a different character as to the emblements: nor is there any room to imply a consent to cultivate the property, when no implication is admitted of a consent to occupy it. As if an authority can be implied in the mortgagor from the mortgagee to permit the cultivation, the same principle, by analogy, will justify such an implication that he had an authority to demise, which, in the principal case, was not admitted.

Rand v.
Cartwright,
1 Ch. Ca. 59.
et vid. 3 Cro.
304.

But such lease will be good against the mortgagor and all strangers, and will entitle the lessee to the equity of redemption.

Skinner 423.

If the mortgagee assigns a term conveyed to him by way of mortgage with a clause, that the mortgagee shall retain the possession, without the mortgagor joining in, and being a party, the assignment determines the similarity of his estate to an estate at will, and makes the mortgagor in the nature of a tenant at sufferance.

Vid. 2. P.
Will. 20. Atk.
351. 2.

If a mortgage of lands be made under a power to pay portions out of the profits, the profits received by the mortgagor, under a clause, that it shall be lawful for the mortgagor to take the profits without account, until default of payment, shall be taken as received by the mortgagee, and shall be considered as the same thing, as if the mortgagee had let it to any other person; and therefore the profits so received by the mortgagor, shall be accounted for, as having gone towards payment of the portion, and the land shall only be subject to what remains due. And the mortgagee must recover his money so far as has been received out of the profits against the mortgagor for the time being, and his personal representatives, and will have no remedy against the trust.

In

In the case of *Smarth* and *Williams*, a question arose, whether an assignment by the mortgagee alone did not operate, so as to make the mortgagor's continuing in possession under such a covenant, a disseisin or divesting of the term, and turn it to a right; for if it did, the assignee could not assign it over, without he either made an entry, or the mortgagor joined. And it was held by *Holt, C. J.* that the mortgagor's continuing in possession, would never make a disseisin nor divesting of the term, or turn it to a right; for a tenant at sufferance has but a bare possession, and no freehold: and *Eyre, Justice*, said, that the covenant to suffer the mortgagor to continue in possession, governs all the subsequent assignments; because it is by the mortgagee, his executors, administrators, and assigns, that the mortgagor shall hold till default of payment; which creates a tenancy at will upon all the mesne assignments.

Salk. 246.
3 Lev. 387.
Rep. T. Holt,
478. Comb.
247. Cro. Car.
302, 307.

It was also contended, in the case last mentioned, that if the mortgagor's continuing in possession was not an absolute disseisin or divesting of the term, it was at least a divesting of the term at the election of the mortgagee, and then the assignee had made his election by bringing an ejectment against

the mortgagor, which admitted his being out of possession; but *Holt, C. Just.* said, that the ejectment could not admit an actual divesting, so as to turn the term to a right, for the ejectment was not brought to recover the mortgage term, but the actual *possession* only, for the recovery of which the assignee of the first mortgagee had no other way but this, or to make a forcible entry, which the law forbids: and his Lordship said, that the court would take notice that an ejectment was only a fictitious proceeding for recovering the possession, which could not well otherwise be obtained; and the entry laid in the declaration, or confessed by the defendant, was not an entry that was real; for it would neither avoid a fine nor be sufficient evidence to support trespass for the mean profits.

Dyer 62. Co.
Lit. 57. b.

But if the mortgagee in the last mentioned case, had done any act, by which he had admitted himself to be out of possession, the consequence would have been as contended for on the part of the mortgagor; for Lord *Coke* says, if a man make a lease at will, and die, now is the will determined; and if the lessee continue in possession, he is tenant at sufferance, and yet the heir, by admission, may have an issue of *mort d'ancestor* against him,

him; and so it is said in *Dyer*, that if tenant for years surrenders, and still continues in possession, he is tenant at sufferance, or disseisor at election.

If a mortgagor commit waste, whether it be a mortgage in fee or for a term of years, the court, on a bill by the mortgagee to stay waste, will grant an injunction; for they will not suffer a mortgagor to prejudice the incumbrance.

It is a settled doctrine, in a court of equity, that a mortgagor in possession cannot bar a mortgagee by a fine and non-claim; for, although the mortgagee be in reality out of possession, yet, where that is done by the consent of both parties, and the nature of the contract requires that it should be so while the interest is paid, it would be against the original design of the contract, that any act of the mortgagor, except the payment of the money and interest, should deprive the mortgagee of his security.

A recovery suffered by a mortgagor tenant in tail, lets in all precedent incumbrances.

Thus where tenant in tail demised lands for 99 years, by way of mortgage, and

O 3

then

Farrant v. Lovel,
3 Atk. 723.

1 Vent, 82.
1 Lev. 272.
2 Vez. 482.
Hard. 402.
Noy's Rep.
23.
Firmers's Ca.
3 Cro.
Cruise on
Fines, 233.
Sid. 460.
Carth. 101.

Porter v. Emery,
1 Ch. Rep.
97.

Goddard v. Complin,
1 Ch. Ca.
119.

then married, and suffered a recovery to enable him to make a jointure; one question was, whether the recovery should enure to make good the mortgage, it being designed for the marriage settlement only? And it was determined that it should; for, if no recovery had been, there could have been no jointure, and the jointress could not have avoided the mortgage; she was in by the act of her husband, and no subsequent act of his could avoid his own act precedent: and though the recovery was suffered to a collateral purpose, yet it would enure to make good all precedent acts and incumbrances.

Cowper, 601. A mortgagor is never permitted to dispute the title of his mortgagee; because no man is permitted to dispute his own solemn deed.

Doug. Rep.
610,

A mortgagor *in possession* gains a settlement, because the mortgagee, notwithstanding the form, has but a chattel, the mortgage being only a pledge to him for security of his money; and the original ownership of the land still residing in the mortgagor, subject only to the legal title of the mortgagee, so far as such title is requisite to the end of his security.

But

But if the mortgagee evict the mortgagor, and take possession, the mortgagor, though afterwards occupying permissively for a particular purpose, will not thereby gain a settlement.

A pauper entitled to an equity of redemption of a freehold estate, which had been mortgaged by his father, having been evicted by the assignee of the mortgagor, afterwards gained permission of the steward of the mortgagee to inhabit a house, part of the mortgaged estate, and which was then untenanted, *for the purpose of overlooking some repairs*, which he proposed to do upon the estate, with an intention to sell the same, and pay the mortgage money. In consequence of such permission, he went into the house, and inhabited the same for upwards of three months, when he was removed by an order of Justices. The pauper did not, during such residence do any thing towards the repairs of any of the houses, or towards a sale of the the estate. No agreement was made between the pauper and the steward, with respect to any rent to be paid by the pauper for such house. The question was, whether the pauper gained a settlement by this residence. And it was held that he did not. For though it is clear that an equitable title

The King
against the In-
hab. of Ca-
therington, 3
term, rep.
771.

is sufficient to give a settlement, *that* only applies where the mortgagor is in possession. But in this case he had neither *jus in re*, nor *ad rem*.

Mosely, 318.

If one borrows money for another on a mortgage, he may file a bill against him to pay off the mortgage money, and shall not be put to his *indebitatus assumpsit*.

The methods of redemption and foreclosing being found dilatory, expensive, and inconvenient, not only to the mortgagee but also to the mortgagor, the legislature deemed it necessary to interfere, and in some degree remedied it by the 7 Geo. 2. c. 20. by which statute it was provided, that after payment or tender by the mortgagor of principal, interest, and costs, the mortgagee shall maintain no ejectment, but may be compelled to re-assign his securities, and deliver all deeds, evidences, and writings in his custody, respecting the mortgaged premises to the mortgagor. And that, where a bill is filed to redeem or be foreclosed, the court may, upon application by the defendant, and upon his admitting the right and title of the plaintiff in the suit, before such suit be brought to hearing, make such order or decree therein, as would have been made

made in case such suit had then been regularly brought to hearing before such court.

But it is provided, that this act shall not extend to any case where the person against whom the redemption is prayed, shall (by writing under his hand, or the hand of his attorney, agent, or solicitor, to be delivered before the money shall be brought into such court of law, to the attorney or solicitor for the other side) insist, either that the party praying a redemption has not a right to redeem; or that the premises are chargeable with other, or different principal sums than what appear on the face of the mortgage, or shall be admitted on the other side; nor to any case where the right of redemption to the mortgaged lands and premises in question, in any cause or suit, shall be controverted or questioned by or between different defendants in the same cause or suit; nor shall be any prejudice to any subsequent mortgagee or incumbrancer.

By the 7 *W. & M. c.* 25. It is enacted,
 “ that no person shall be allowed to have any vote in election of members to serve in parliament, for or by reason of any trust, estate, or mortgage, unless such trustee or
 mort-

mortgagee be in actual possession or receipt of the rents and profits of the same estate; but that the mortgagor, or *cestui que trust* in possession, shall and may vote for the same, notwithstanding such mortgage or trust."

C A P. VIII.

Of the Estate of the Mortgagee, &c.

TO form an accurate idea of the nature of the interest of a mortgagee in the estate pledged as a security, he must be viewed at four periods of time:

First, At the instant of executing the mortgage, and before forfeiture, while possession is (as is usually the case) in the mortgagor.

Secondly, After the mortgage is forfeited by non-payment of the money at the day, and before the mortgagee enters into possession.

Thirdly, After the mortgagee enters into possession on the eviction of the mortgagor.

And,

And, Fourthly, on foreclosure, of which we shall speak at large hereafter.

Vid. *1 Atk. 170.*

The estate of the mortgagee, until forfeiture, still continues as it was at common law, before the interference of courts of equity: he is entitled to an estate as tenant in mortgage in fee, or for term of years, subject to any agreement made between him and the mortgagor relative to the possession, and defeazable at law by performance of the condition. As soon as the estate is created, he may enter into possession; but as the payment of the interest is the principal object of the mortgagee, he seldom avails himself of that right, unless obliged so to do to secure payment of the interest, or with a view to compel the re-payment of the money.

Keech v. Hall,
supra, 69.

It follows from hence, that all leases or other interests in the land, made or conveyed by the mortgagor subsequent to the mortgage, though before forfeiture, are void against the mortgagee. As to him, the tenants under such leases, or persons claiming such interests, may be considered as trespassors, disseisors, and wrong-doers.

On

On the same principle, the mortgagee (since the statute 4 *Ann. c. 16*, to dispense with the necessity of attornment of tenants) on notice becomes entitled to the rent of the premises mortgaged (if let) from the time of executing the conveyance ; for the rents and profits are liable to the debt as well as the premises themselves.

This was determined in the case of *Moss* against *Gallimore* and another, upon a special case reserved in an action of trespass at the assizes for *Staffordshire*. The case was as follows : One *Harrison*, being seised in fee, on the first of *January*, 1772, demised certain premises to the plaintiff, *Moss*, for twenty years, at the rent of 40*l.* payable yearly on the 12th of *May*; and in *May* 1772, he mortgaged the same premises, in fee, to the defendant, *Mrs. Gallimore*. *Moss* continued in possession from the date of the lease, and paid his rent regularly to the mortgagor, all but 28*l.* which was due before the month of *November*, 1778, when the mortgagee became a bankrupt, being at the time indebted to the mortgagee in more than that sum for interest on the mortgage. On the 3d of *January*, 1779, one *Harwar* went to the plaintiff, on behalf of *Gallimore*, shewed him the mortgage-deed, and demanded

Moss v.
Gallimore, et
al.' Doug.
Rep. 266.

manded from him the rent then remaining unpaid. This was the first demand that *Gallimore* made of the rent. The plaintiff told *Harwar*, that the assignees of *Harrison* had demanded it before, viz. on the 31st of *December*; but when *Harwar* said that *Gallimore* would distrain for it, if it was not paid, he said he had some cattle to sell, and hoped she would not distrain till they were sold, when he would pay it. The plaintiff not having paid according to this undertaking, the other defendant, by order of *Gallimore*, entered and distrained for the rent, and thereupon gave a written notice of such distress to the plaintiff in the following words: "Take notice, that I have this
 " day seized and distrained, &c. by virtue
 " of an authority, &c. for the sum of 28*l.*
 " being rent, and arrears of rent, due to
 " *Esther Gallimore*, at *Michaelmas* last past,
 " for, &c.; and unless you pay the said
 " rent, &c." He accordingly sold cattle and goods to the amount of 22*l.* 2*s.* The question stated for the opinion of the court, was, whether, under all the circumstances, the distress could be justified? And the court determined that it might, saying this case was, in its consequences, very material. It was the case of lands let for years, and afterwards mortgaged; and considerable doubts
 in

in such cases had arisen in respect to the mortgagee, when the tenant colluded with the mortgagor ; for, the lease protecting the possession of such a tenant, he could not be turned out by the mortgagee. Of late years the courts had gone so far as to permit the mortgagee to proceed by ejectment, if he had given notice to the tenant that he did not intend to disturb his possession, but only required the rent to be paid to him, and not to the mortgagor. This however was intangled with difficulties. The question here was, whether the mortgagee was, or was not, intitled to the rent in arrear ? Before the statute of queen *Anne*, attornment was necessary, on the principle of notice to the tenant ; but when that took place, it certainly had relation back to the grant, and, like other relative acts, they were to be taken together. Thus livery of seisin, though made afterwards, related to the time of the feoffment ; since the statute the conveyance was complete without the attornment ; but there was a provision that the tenant should not be prejudiced for any act done by him, as holding under the grantor, till he had received notice of the deed : therefore the payment of rent, before such notice, was good. With this protection he was to be considered by force of the statute, as having attorned at

the execution of the grant. And here the tenant had suffered no injury. No rent had been demanded, which had been paid before he knew of the mortgage. He had the rent in question still in his hands, and was bound to pay it according to the legal title. But having notice from the assignees, and also from the mortgagee, he dared to prefer the former, or kept both parties at arms-length. In the case of executions it was uniformly held, that if any one acted after notice, he did it at his peril. He did not offer to pay one of the parties on receiving an indemnity. As between the assignee and the mortgagee, who was intitled to the rent? The assignees stood *exactly* in the place of the bankrupt. Now a mortgagor was not properly tenant at will to the mortgagee, for he was not to pay him rent, he was only so *quodam modo*—Nothing was more apt to confound than a simile. When a court or a counsel called a mortgagor a tenant at will, it was barely a comparison. He was like a tenant at will; the mortgagor received the rent by a tacit agreement with the mortgagee, but the mortgagee might put an end to the agreement when he pleased. He had the legal title to the rent; and the tenant in the present case could not be damnified, for the mortgagor could never oblige him to

pay over again the rent which had been levied by this distress. This remedy was a very proper additional advantage to mortgagees, to prevent collusion between the tenant and mortgagor.

But, on a motion for sequestrators to pay rents to the mortgagee, which they had received from the tenants of the mortgaged estate, his honor, the Master of the Rolls, said, That the court of King's Bench, he understood, now entertained some doubts of the propriety of the decision of *Moss v. Galimore*; that the principle upon which that case was decided was, that the right of the mortgagee would have furnished a good defence, if put on the record by way of justification under the mortgage term or conveyance. This reason, his honor observed, had imposed upon him; but it was not considered that it might have been replied to the defence that the mortgagor, till notice, was tenant at sufferance, if not tenant at will, to the mortgagee.

In Chancery,
5th July 1786.

In the case of *Sparkes v. Smith*, the court refused, on bill, to compel an assignee of a term on mortgage to discover his assignment; the object of the lessor in requiring it, being to make him liable to the covenants

Sparkes v.
Smith et al.
2 Vern. 275.

nants of the mortgagor, although he had not taken actual possession of the premises.

This was a mortgage of houses held upon leases for seven years, with covenants, that the lessee should repair, defeazable upon payment of the money lent and interest. The houses being greatly out of repair, the original lessor filed a bill to discover, whether the lease was not assigned to the mortgagee, and to compel him to perform the covenants on the lessee's part. The defendant, by answer, insisted he never was in possession, nor had received any of the rents, except a small sum by an order from the mortgagor to one of the tenants, which was paid him in part of what was due on the mortgage, and not as rent. And the court, although it was the mortgagee's folly to take an assignment of the whole term, whereby he subjected himself to the covenants in the original lease, instead of taking a derivative lease of all the term but a month, or week, or day, as he might have done, yet, as he was only a mortgagee, and never in possession, would not assist the plaintiff to charge him to perform the covenants *in specie*; but left the plaintiff to recover at law as well as he could, and dismissed the bill.

But,

But, in a subsequent case, where one hundred pounds were lent by way of mortgage upon an assignment of a building lease, and the mortgagee never entered nor took possession, but lost the money lent; the defendant in equity having recovered against the mortgagee, as assignee, the rent reserved on the lease, the bill was to be relieved against the recovery at law; and the court dismissed it; saying, the mortgagee was ill advised to take an assignment of the whole term.

Pilkington v.
Shaller *et al.*
2 Vern. 374.

Upon an accurate investigation of the reasons upon which the decisions in the two preceding cases were founded, they will appear perfectly reconcileable; in both, *the principle of law, that an assignee of a whole term is subject to the covenants in the original lease*, is fully admitted. The different events of the applications, therefore, did not arise from a contrariety of opinions as to the legal operation of such an assignment, but arose from the parties having changed sides on the applications to the court. In the former case the lessor was plaintiff, and being unable to make out his case at law, without the help of equity, applied for its aid to enforce a rigorous and hard demand, founded in strict law; the court, in this case, as it does in all others, when it is called upon to use a discretionary

power, took into its consideration the relative situation of the parties ; and the plaintiff's claim being unconscionable, elected to remain passive, and leave the parties, as they stood at law ; but, in the latter case, the assignee was plaintiff against the lessor ; so that he, and not the lessor, sought the aid of equity, after the latter had obtained a judgment at law upon the covenants ; in which case, there appears to me to have been no ground for their interference, unless fraud or mistake had been suggested : for the original lessor, having a right at law to the benefit of the covenants in his lease, equity in that case must follow the law.

And when cases are attended with hardship, leaving the parties to such remedy only as they are intitled to at law, is not uncommon in a court of equity. Thus if a bill be brought by a remote heir against the next of kin, for a discovery of a title, and evidence, and to have terms removed and the title at law cleared ; this being a hard case, equity will not assist ; for as it would not relieve the children, should the remote heir recover, so neither will it assist the remote heir.

Eaton v.
Jacques,
Douglas
Rep. 438.

However, upon reconsideration of this question, in the case of *Eaton* against *Jacques*, which

which arose upon a case reserved at the sittings for *Middlesex* before *Buller, Justice*, it was determined, that a mortgagee, assignee of a term for years, should not be liable to the covenants in the lease, unless he had taken actual possession.

The circumstances set forth in this case *Ibid.* were, that on the first of *December*, 1775, the plaintiff demised the tenements in question to *Denys*; that, on the 21st of *June*, 1777, by indenture, made between *Denys*, of the one part, and the defendant of the other part, after reciting the lease, *Denys* (for the considerations therein mentioned) bargained, sold, assigned, transferred, and set over unto the defendant, his executors, administrators, and assigns, the premises demised by the lease, and all the estate, right, title, interest, benefit of renewal, term of years, and time to come and unexpired, property, profit, claim, and demand whatsoever, of *Denys* in the same, by virtue of the lease or otherwise howsoever, to hold unto the defendant for all the residue of the term of twenty-one years by the said lease demised, and subject nevertheless to the rents and covenants therein contained, and which were on the tenant's part to be paid, kept, and performed: in which indenture was contained a proviso for

making the same void on payment of one hundred and fourteen pounds, and interest at *five per cent. per annum* ; and there was another proviso and agreement between the parties, that until default should be made in payment of the one hundred and fourteen pounds and interest, contrary to the intent of the said proviso, it should be lawful for *Denys*, his executors, administrators, or assigns, to hold and enjoy the premises without interruption from the defendant ; that the interest which became due on the mortgage was regularly paid up to, and on, the 21st day of *December*, 1778 ; and that the defendant never had possession of the houses under the mortgage. The question submitted to the court was, whether the plaintiff was intitled to recover the rent which became due at *Christmas*, 1779, from the defendant ? And Lord *Mansfield* said, that, in point of fact, this case must have existed for a century past in a thousand instances. In this great town particularly, building leases had been and were perpetually mortgaging ; and yet no instance had been found, where the ground landlord had attempted to charge the mortgagee, not in possession, with the rent or covenants. This was a strong argument against the plaintiff, especially where the case was so hard, so unjust, and unconscionable. Numberless
incon-

inconveniencies would arise if such a demand could be supported. The mortgagee never asked whether the rent was paid ; he only looked to his security, and, when the principal and interest were paid, he reassigned. But, if the plaintiff was right, a mortgagee might be called upon, years after such reassignment, for arrears or breaches of covenant during the assignment ; the consequences would be terrible : and all this arose from a mere slip in the attorney in making the conveyance ; for if he had made it an under-lease, by leaving a reversion of a day in the mortgagor, the landlord would have had no pretext to call upon the mortgagee. Though no cases had been cited at the bar which applied to the present question, the court had found two in *Vernon*, which he would state that it might not be supposed, after this judgment they had been overlooked. His Lordship stated the cases of *Sparkes v. Smith* and *Pilkington v. Shaller*, and said, the latter could not be supported ; for the court there refused to relieve the mortgagee, because it was his own fault to take an assignment of the whole term, and not an under-lease ; but that was a very common ground of relief in equity. These cases, therefore, left the question as it stood upon the argument at the bar ; and, there being no solemn well-considered decision, the

Holtford. v.
Hatch,
Doug. 174.

Supra, 85,
86.

court might resort to the principles. In leases, the lessee, being a party to the original contract, continued always liable notwithstanding any assignment; the assignee was only liable with respect to his possession of the thing. He bore the burthen while he enjoyed the benefit, and no longer: and if the whole was not passed, if a day only was reserved, he was not liable. To do justice between men, it was necessary to understand things as they really were, and construe instruments according to the intent of the parties. What was the effect of this instrument between the parties? The lessor was a stranger to it; he should not be injured, but he was not intitled to any benefit under it. Could they shut their eyes and say it was an absolute conveyance? It was a mere security; and it was not, nor ever was meant that possession should be taken until default of payment, and the money had been demanded. The legal forfeiture had only accrued six months, and, if the mortgagee had wanted possession, he could not have entered *via facti*. He must have brought an ejectment. This was the understanding of the parties, and was not contrary to any rule of law. It was not an assignment of all the mortgagor's estate, right, title, &c. *Willes, Ashurst,*

and *Buller, Justices*, were of the same opinion.

And in a subsequent case of *Walker v. Reeves*, *M. 22 Geo. 3.* this doctrine was confirmed as to mortgages, and a distinction taken between the case of an assignment *by way of mortgage*, and unconditional assignments.

Walker v. Reeves,
Doug. Rep.
444 (note 1.)

But, if the mortgagee enters into possession, he becomes liable to all covenants that run with the land, for he takes it *cum onere*, and, enjoying the profits, he must submit to the losses.

Traberne et al. v. Sadleir et al.
1 Brown's
Par. Ca. 105.

And if a mortgagor, by a mortgage of a term vested in him, divests himself of all interest therein, in the consideration of a court of law, he retains only the equity of redemption, which he must pursue in a court of equity; and therefore, if he join with his mortgagee in a lease, in which the lessee is made to covenant with the mortgagor, for rent, repairs, &c. such covenants will be merely collateral to the mortgagee's interest in the land, and the assignee of the mortgagee, cannot maintain an action for the breach of them on the statute of 32 H. 8. c. 34.

Thus

Webb. v.
Ruffel
3 Term Rep.
293.

Thus where *S* and *W*, described therein, to be the mortgagee of the estates in question, for a term of 99 years, demised them to *R* for 11 years, at a yearly rent, payable to *S* or his assigns; in which was contained covenants on the part of *R* with *S*, and his assigns, *inter alia*, to pay the rent and to keep the premises in repair; it was held, on an action of covenant, brought by the devisee of the mortgagee, the declaration in which set forth two breaches of covenant, the one for non payment of rent, and the other, for not keeping the premises in repair, that the action could not be maintained. Lord *Kenyon*, in delivering the opinion of the court, observed, it was well settled at common law, without referring to the statute 32 *H. 8. c. 34.* that covenants, which run with the land, will pass to the person to *whom the land descends*. And that statute enacted, for the benefit of the *Grantees* of reversions, that they should have the like advantages against the lessees, their executors &c. by entry for non payment of the rent; and should have, and enjoy, all and every such advantages, benefits, and remedies, by action only, for not performing other conditions, covenants, and agreements, contained in the leases, against the lessees, as the lessors or grantors had. The statute also contained a clause, giving the lessees the same

same remedy, against the grantees of the reversion, which they might have had against their grantors. Therefore, under this statute, the grantors of assignees, stood in the same situation, and had the same remedy against their lessees, as the heir at law of Individuals, or the successors (in the case of corporations) had before the statute. It became therefore necessary to inquire whether this action of covenant could have been maintained by the heir of the person, from whom the plaintiff derived her title. It was stated that S, was only a mortgagor, who had parted with his whole term to the mortgagee; and the declaration went on to state, that the whole interest which was vested in him, he had transferred to the mortgagee. Therefore, in point of law, his lordship could not conceive, how this covenant made with S, could be said to run with the land; for S was stated in the declaration to have no interest whatever in the land, and yet both the implied covenant, arising from the "yielding and paying," and also the express covenants, were entered into with S. It was not sufficient that a covenant was concerning the land, but, in order to make it run with the land, there must be a privity of estate between the covenanting parties. But here, S had no interest in the land, of which a
court

court of law could take notice, though he had an equity of redemption, an interest, of which a court of equity would take notice. These therefore were collateral covenants. And though a party might covenant with a stranger to pay a certain rent, in consideration of a benefit to be derived under a third person, yet such a covenant could not run with the land.

But it is a necessary conclusion, from the resolution in the last-mentioned case, that such covenants, not being made with the person who has the *legal* estate, do not run with the land, and that the assignee of the mortgagee cannot maintain an action on the covenants, that these must be considered as *covenants in gross*, and that of course the mortgagor may maintain an action upon them. And so it was determined on the same instruments, and between some of the same parties in the case of *Stokes* against *Russell* in the court of King's Bench.

Stokes v.
Russell.
3 Term
Rep. 678.

But although the money be not paid at the day, and the mortgagee brings his ejectment, and enters into possession, yet, until after foreclosure, in consideration of a court of equity, and notwithstanding the form, the mortgagee is considered as having but a chattel

chattel, and the mortgage is only a security; Doug. Rep. 610.
the mortgagor is the real owner.

It follows, of course, from this view of the transaction, that the mortgagee, before foreclosure, cannot exercise any act of ownership over the property which may incumber the mortgagor. He can make no lease of the lands for years to an under-tenant.

Thus, in the case of *Hungerford v. Clay*, Hungerford v. Clay, 9 Mod. Ca. Eq. 1. 2 Eq. Ca. 610. the bill was for redemption on payment of principal and interest. The substance of the answer was, that the defendant, the mortgagee, had made a lease of the house for five years at a rent reserved, with a covenant, that the lessee should have the option of a farther lease for four years after the expiration of the said term; that the term for five years was now expired, and the lessee desired to take the premises for four years longer; that, if the plaintiff would grant such lease, the defendant would reconvey on payment of principal and interest. On hearing this case at the Rolls, the defendant had a decree; but, on appeal to the Chancellor, his Lordship was of opinion, that the mortgagee, before foreclosure of the equity of redemption, could not lease

lease the premises for years to bind the mortgagor, unless, to avoid an apparent loss, and merely in necessity: and the decree at the Rolls was reversed.

Indeed, if it were otherwise, it would be in the power of the mortgagee, effectually to bar the mortgagor the benefit of redemption at his pleasure, by granting beneficial leases on fines; besides, if such leases were held good, it would be difficult for the mortgagor to recover any rent, though the principal and interest should be paid; as, not claiming under the estate of the mortgagee, he cannot have any benefit of the lease made by him; for he is neither party to the deed, nor privy to the estate.

And as a mortgagee cannot, before foreclosure, exercise any act of ownership that will attach on the estate, but ought to reconvey the premises free from all incumbrances; so neither can he justify, in equity, the commission of any act which may injure the estate; therefore, though at law, a mortgagee in fee may commit waste, yet he will be restrained in equity.

Thus,

Thus, on a bill to redeem a mortgage, wherein an account was decreed, and two hundred and forty pounds reported due, and exceptions taken to the report; it being, on motion and reading affidavits, shewn, that the defendant had burnt some of the wainscot and committed waste, the defendant was ordered to deliver up possession to the plaintiff, who was a pauper, he giving security to abide by the event of the account.

Hanson v.
Derby,
2 Vernon
392.

So, where the mortgagee of an estate in fee had cut down trees, on application to the court it was decreed, that an account should be taken of what was cut down, and the produce applied in the first place to the payment of the interest, and then to the sinking of the mortgage; and an injunction was granted to stay felling any more.

But a distinction is made where the security is defective; for, in that case, the court will not restrain a just creditor from his legal privileges; but then the timber, when cut down, must be applied to ease the estate, and not to the mortgagee's benefit.

Withrington
v. Banks,
Scl. Ca. Ch.
31.

However, although the mortgagee cannot, to better his security, do any act to

3 Atk. 512.

encumber the estate mortgaged, which will be valid against the mortgagor after redemption, nor will be justified in committing waste; yet he will be intitled to such expences as he shall incur in necessary repairs, or other acts for the preservation of the estate mortgaged, and may, certainly, add this to the principal of his debt, and it will carry interest.

3 Atk. 4.
Lucam v.
Martins,
1 Wilson 34.

Thus if a leasehold estate be mortgaged, and there is no covenant on the part of the mortgagor, that he shall procure the lives to be filled up, the mortgagee cannot compel him to do it: but must pay the expence of renewing, and reimburse himself by adding it to the principal of the mortgage, and it shall carry interest. So it was determined, in the case of *Manlove v. Ball* and *Bruton*, which was a mortgage of a church lease for three lives, two of which died during the time the estate was in mortgage, and were renewed on fines paid by the mortgagee.

Manlove v.
Ball et al.
2 Vern. 84.
Supra, p. 23.

Vid. 3 Atk.
476, 477.
Charlton et
al. v. Low et
al. 3 Will.
328.

A term assigned in trust to attend the inheritance will, in equity, follow all the estates created thereout, and all the incumbrances subsisting upon such inheritance, and is so connected with it, that equity will not suffer it

it to be severed to the detriment of a *bona fide* purchaser. Therefore a mortgagor shall have the benefit of all the interests which the mortgagor had at the time the mortgage was made, unless against an intermediate purchaser without notice: and, consequently, if there be a term in a mortgaged estate held in trust for the mortgagor, when the mortgage of the inheritance is made, the concealment of it will be a fraud upon the mortgagee, and the trustees of such a term assigned to attend the inheritance, will, in equity, become trustees for the mortgagee of the inheritance.

If a mortgage be made of an estate to which the mortgagor has not a good title, and then he who has the real title conveys to the mortgagor, or his representatives, with a good title; the mortgagee will be intitled, in equity, to the benefit of it; for it will be considered there as a graft into the old stock, and as arising in consideration of the former title.

As where houses and lands were demised a long term, and an assignee of the lease, believing he had a good title, mortgaged it for 100 l. afterwards the title turned out to be bad, the estate belonging to another person.

Seabourne v.
Seabourne,
2 Vern. 11.

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Then the real owner of the estate, out of compassion to the assignee, who had built upon it, leased the premises for a long term to trustees for his wife, he being run away. And on a bill filed, the trustees were decreed to make a new mortgage to the mortgagees; the Master of the Rolls saying, that this was a graft on the old stock, all the benefit of it, except the rent reserved, arising in consideration of the former title.

Rakestraw v.
Brewer,
Sel. Ca. in
Ch. 55.
Lee v. Lord
Vernon,
7 Brown's
Par. Ca. 432.

If a mortgagee procures a grant of a new term after the old one be actually expired, yet this will be a trust for the mortgagor, and redeemed with the principal; for it is supposed to have proceeded from having had the original term: and, although there be nothing in fact in having a tenant-right, yet, as such regard is had to it, in the estimation of the world, it will be looked on as the occasion of the lease.

3. Atk. 518.

But the mortgagee is not obliged to lay out money, except to keep the estate in necessary repair.

Com. Rep.
609.

The mortgagee of an estate to which an advowson is annexed, or of a naked advowson having the legal estate, has consequently a right to present at law; but since a presentation

sentation is gratuitous, and the mortgagee cannot account for any benefits from it, a court of equity will compel the mortgagee to present the nominee of the mortgagor.

And upon the same principle, if a mortgage be made of a manor to which an advowson is appendant, and a *quare impedit* be brought by the mortgagee to compel the mortgagor to present his nominee, the Court of Chancery will grant an injunction to stay proceedings thereupon; for the mortgagee can make no profit by presenting to the church, nor can account for any value in respect thereof to sink or lessen his debt; the mortgagee therefore in that case, until foreclosure, is but in the nature of a trustee for the mortgagor.

Amhurst v. Dawling,
2 Vern. 401.
Jory v. Cox,
Prec. Ch. 71.
Attorney General v. Scarisbrick et al.
2 Vern. 549.
Dymoke et al. v. Sir John Hobart,
1 Brown's Parl. Ca. 81.
Gally v. Serj. Selby,
Strange 403,
Sc. Comyns 343.

A distinction was attempted, in the case of *Gardiner v. Griffith*, between this case, and that in which the mortgage was of a long term in a naked advowson; because the mortgagee could have no other satisfaction than by providing for a child, relation, or friend, on the advowson becoming void; and the rather, for that it was expressly so agreed in the mortgage deed, but the court gave no opinion thereupon.

Gardiner v. Griffith,
2 Will. 404.

And, in the case of *Mackenzie v. Robinson*,

Mackenzie v. Robinson,
3 Atk. 560.

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which

which was the case of a mortgage of a naked advowson, Lord *Hardwicke* doubted the legality of such a covenant, *that the mortgagee should present*, it being a stipulation for something more than principal and interest; and the mortgagee, not being able to find any precedent in his favour, gave up the point of presenting; in consequence whereof, an order was made, that the mortgagor should have liberty to present, and the mortgagee was obliged to accept of his nominee.

Gardiner v.
Griffith,
2 Will. 405.
3 Atk. 458.

But if the mortgagee present to an advowson a bill by the mortgagor, to compel the incumbent to resign and to deprive him of his living, will be dismissed, unless brought within six months after the death of the last incumbent.

Ibid.

In such case the mortgagee, instead of bringing a bill of foreclosure, should pray a sale of the advowson.

A mortgagee takes the estate mortgaged in the same plight that it is in, in the hands of the mortgagor. If the mortgagor therefore has done any act that amounts to a forfeiture, the mortgagee will lose his security

Thus

Thus where tenant for life, with remainder to his wife for life, remainder to his sons in strict settlement, remainder over, having occasion for money, together with his wife, mortgaged the estate settled by way of lease and release and fine, *come ceo*, &c. which mortgage was afterwards assigned to the plaintiff, and another lease and release and fine levied and executed by the husband and wife for the making good the assignment. The husband died, and a bill was brought against the widow and eldest son to compel them to redeem or to foreclose them, and to be relieved against the forfeiture. The defendant, the son, pleaded the marriage settlement of his father and mother, who were but tenants for life, and insisted on the forfeiture; and the Court allowed the plea: the Lord Chancellor saying, that this was a contrivance to destroy the settlement and disinherit the son; and his Lordship said, he had so decided in many cases, particularly in the case of Sir *Harry Peachy* and the Duke of *Somerset*.

Lady Whetstone v. Sainsbury,
Pre. Ch. 591.

But the following case, which preceded the foregoing one in point of time, seems to have received a contrary decision, unless the circumstance added by way of note by the reporter can be considered as taking the case

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out of this rule, and I am not aware upon what principle that circumstance can be made to affect the remainder-man.

Willis v.
Fineux.
Pre. Ch. 108.

There tenant for life, remainder in fee to his son, under a devise from his sister, whose heir he was, made a lease of the devised premises by way of mortgage, and levied a fine to the mortgagee for corroborating the term. The son came of age, and brought his ejectment founded upon the forfeiture committed by his father by levying the fine, and recovered: and upon a bill by the mortgagee to be relieved, the Master of the Rolls decreed, that the mortgagee should hold and enjoy against the son during the life of the father.

But the reporter of the preceding case adds, by way of note, that the father, on making the mortgage, had made affidavit, that the devisor under whom he claimed died intestate, and that he knew of no incumbrances on the state, although he had proved her will long before.

Lloyd v.
Baldwin,
1 Vez. 173.

If a mortgage be made under a decree, and directions for a sale or mortgage with approbation of the master, and part of the direction be, that the money raised thereby

thereby should be applied for payment of debts, and a report be made, ascertaining the debts by schedule, the mortgagee must see to the application of the money; as, if it be misapplied, he will lose the benefit of his security; for, in such case, the sum directed to be raised is considered as the property of the creditors, and the interest, carved out of the estate operated with the charge, is an express trust for them, which runs with the land from the time of the decree, and cannot be discharged but by actual payment, which intitles the person advancing the money to stand in their place. But, if their debts be not paid, there is no estate or interest in the land, upon which the mortgagee's demand can attach; that created by the court, being exactly commensurate with the extent of the debts upon it, and liable to those charges until they are paid off.

So where, after such a decree, the estate was mortgaged, and in the deeds there was a recital of the bill and all the proceedings thereon; and the money, instead of being applied pursuant thereto, was paid to a trustee named by the mortgagee, upon trust, to pay it over to the creditors: it was held that the estate in the hands of the mort-

Lloyd v.
Baldwin,
1 Vez. 173.

gagee was liable ; for where there was such a specification or schedule, a purchaser or mortgagee was bound to see the application of the purchase-money.

Lloyd v.
Baldwin,
1 Vez. 173.

And, in such case, the creditors will not be obliged to resort to the trustee in the first instance, for the agreement between the parties cannot change their security.

Ewer v.
Corbett.
2 P. Will. 149.
Burling v.
Stonard.
ibid. 150.

And the principle would apply, if a term or other specific thing were devised by a testator, and he died indebted, making another person, and not the legatee of the term, executor. Such executor might mortgage the term, and it would not avail the legatee to say, that the executor was trustee for him, and, that his assignee purchased, subject to the trust of which the will was notice ; for I take it now to be clear law, that an executor, where there are debts, may charge or dispose of a term, and the devisee of the term has no other remedy, but against the executor, to recover the value, if there be sufficient assets for the payment of debts without it. And the argument of notice avails nothing, for every person contracting with an executor, where he is named executor, must of necessity have notice ; so that if notice of a will were to be an hindrance, no executor could raise money by mortgage or sale.

But if an executor should mortgage a term so circumstanced, to one, who had notice that there were no debts, or that all the debts were paid, this would alter the case, for in such case, a court of equity would relieve against the collusion.

Vid. Crane v. Drake.
2 Vern. 616.

The law is the same if the mortgage be made under the devise of an estate to be mortgaged or sold for payment of specific debts in a schedule.

Ibid.
Spalding v. Shalmer et al.
1 Vern. 303.

In such cases the mortgagee ought not to pay the money to the trustees, but should see to the application, and take assignments from the creditors.

1 Vez. 173.
et vide Barnard Equit. Rep. 81.

And where one having mortgaged his lands, devised them to *Y* in trust, in the first place, to pay off and discharge the mortgages on the same, and in the next place, for payment of several legacies, and particularly of a legacy of 200*l.* to *B*, the remainder in fee to *Y*, and made *Y* his executor. And *Y* proved the will, and paid several debts owing by the testator, that were not mortgage debts, and to raise money for that purpose, made several new mortgages of the lands

Brent v. Best.
1 Vez. 69.

lands in question. It was insisted, on a bill filed to recover *B*'s legacy, that after the mortgages made by the testator were discharged, the land then should stand charged with that legacy, and that then, *B* ought to be let into an immediate satisfaction thereof, and ought not to be postponed by the new mortgages made by *X*. But it was insisted by the counsel for the mortgagee, that *B* could not be permitted to redeem part, without redeeming the whole, and that the land stood charged as well with the mortgages made by *X*, as with those made by the testator. And in this case, *X* was not only a trustee for payment of debts, but also executor to the devisee, and so the lands in his hands became legal assets, and charged with all the debts of the testator, and by consequence with the new mortgages made by *X*, the money having been raised and applied for payment of the debts of the testator. But it was replied that it was so, where a general trust is raised for payment of all debts, but in this case, *X* was a special trustee, and directed by the will to pay off the mortgages, and then the legacies, and that no provision was made for other debts. *Sed non allocatur.*

So,

So, if money be advanced by a mortgagee under an act of parliament, the mortgagee must see to the application of it.

And generally, where there is a specific sum charged upon a testator's estate, it is incumbent upon the mortgagee to see to the application; and accordingly it was held, in the House of Lords, on an appeal, that a mortgagee of the executor, should not prevail against the devisees, claiming under the charge, and the decree made to the contrary was reversed. The case was as follows: *B*, having a term for twenty-one years in a Printing-Office, made his will, and thereby charged the same, together with some lands, with payment of his debts and legacies; he then expressly devised to his executors, all his right to the Printing-Office, and all benefit coming therefrom; and willed, that out of the profits thereof, and of his lands, his executors should, *inter alia*, pay the interest of 2000 *l.* to his daughter *G* and her husband, and, out of the overplus of these profits, should raise the 2000 *l.* and put it out to interest, and made *G* sole executor, until his son *C B*, attained twenty-one, and then he appointed both of them executors. Afterwards *G* and *C B* mortgaged the term in the Printing-Office to *B*, for 1000 *l.* which mortgage was afterwards assigned to *H*, who advanced

Humble v.
Bill *et al*.
2 Vern 444.
Mich 1703. *sc.*
Brown's cases
in parl. 7 *sc.*
Viner vol. 8.
p. 427.
Ca. 13, 62.
Ca. 17, vol. 2.
p. 270.
Ca. 6, *et vid.*
Smith v.
Guyon.
1 Browns ca.
chan 186.
Lingard v.
Derby.
ibid. 312.

advanced 1800*l.* and it was invested there was no occasion to sell to pay debts, and that *H* having notice of the will, took the estate subject to the 2000*l.* But the court was of opinion, that the executor of a testamentary estate, had the power over it, so as to alien or sell as he should judge necessary, and that if he sold in prejudice of a residuary or specific legatee, they might have their remedy against the executor, but not follow the estate into the hands of a purchaser, and, therefore, decreed an account to the plaintiff of the rents and profits, and that he should enjoy the Printing-Office, and the defendants redeem or be foreclosed : but this decree, as to so much of it as tended to the prejudice of the appellants, was afterwards reversed upon an appeal to the House of Lords.

But it is an established doctrine that, upon a trust or devise for the payment of debts in general, without a specification of the debts in a schedule, a purchaser would be indemnified, although he should not see to the application of the money ; which is a determination in support of such trust, and to render the sale of such estate more easy ; for otherwise the lands could never be discharged of such trust without a suit in a court of equity

equity, which would be extremely inconvenient.

And the law is the same, where lands are charged with the payment of debts generally ; for in this case, as well as that of lands directed to be sold for payment of debts, the trust may be said to be performed as soon as the lands are converted into a fund, to answer the demand upon them.

Though where lands are appointed or conveyed to pay debts, the heir is intitled to have them after the debts paid, yet a purchaser is not concerned, whether there be sufficiency or not to pay this out of the personal estate ; for, if he advance his money on the lands, he shall hold them against the heir, notwithstanding there be personal assets, and the heir must take his remedy against the trustee ; and so, if the matters rest in account between the heir and trustee, his purchase is safe, though the money be misapplied by the trustee.

Culpepper v. Aston,
2 Ch. Ca.
115. 223.

But if the lands be not to be sold, if the debts can be raised out of the personal assets, and the rents and profits of the lands, the purchaser acts at his own peril, if the personal estate and profits of the land received

Culpepper v. Aston,
2 Ch. Ca, 115
223.

received were sufficient, and afterwards become insufficient.

Ibid.

And in the former case, if the heir (who is intitled to the lands, after sufficient is raised, by a trust implied and resulting on construction of the trust in the instrument, though not expressed) doth attach his claim by exhibiting the bill, then no one can safely purchase after the bill, *lite pendente*; for, when exhibited against the trustee, it will bind him and all claiming under him, *pendente lite*. For a *lis pendens* between the heir and trustee, to have an account, is sufficient notice in law, without actual notice of the suit, and then a purchaser acts at his peril; if in the event of that suit it falls out, that the debts were paid when he purchased, or that there was sufficient of the personal estate to pay his debts without sale, the heir will recover against the purchaser; but if it fall out there was a necessity to sell them, the purchaser is safe.

It has been at times made a question, whether, when a man devises his lands for payment of his debts, all his debts shall not be thereby put upon the same footing, the consequence of which would be, that his simple contract debts, as well as his specialty debts,

debts, would bear interest, and some countenance is given to those who contend on that side of the question, which favors the simple contract creditors, in the case of *Car* and *the Countess of Burlington*, as reported in *Peer Williams*. 1 P. Will. 228.

In that case, Lord *Burlington*, owing debts by bond and simple contract, made a lease of all his lands in *England* and *Ireland*, to trustees in trust, to pay all the debts which he should owe at his death, all to be paid in a just proportion, without preference of one debt before another. And Lord *Harcourt* is stated to have determined among other points, "that by this trust term, the simple contract debts became as debts due by mortgage, and consequently should carry interest, as well as debts secured by bond." And the same proposition is affirmed by Lord *Macclesfield*, Chan. in the case of *Maxwell* and *Wettenhall*, where lands are devised by a man for payment of his debts, on the ground that the land which is the fund yields annual profits. 3 P. Will. 27.

But this opinion of Lord *Harcourt*, if given by his Lordship, as to which great doubt is entertained, has since been overruled; upon the principle, that providing
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for the payment does not, in the first instance, alter the nature of the debt, and then although a debt upon bond is the principal and interest also, that is, the interest is part of the debt, yet it is not so as to simple contract debts, for they do not bear interest, and therefore the interest is no part of the debt, and then there seems no reason why the providing for the payment of such debt, should so far alter its nature as to make the interest a part of it. And if it were so, great prejudice might from thence ensue to creditors, as it would make people afraid to charge their lands with the payment of their debts, lest they should thereby bring a great burthen upon their estate, by changing the nature of the demands upon it. And, therefore, the constant course of the Court in such cases, is to refer it to the Master to see what is due, and to allow interest on such of the debts as in their nature carry interest. And accordingly Lord *Hardwicke*, in the case of *Burvell* and *Parker*, in which this question arose upon a trust term created by deed, for payment of debts and legacies, out of a real estate on the death of the owner, held, that there was no colour for such a demand; his lordship observing, that if a man by will created a trust out of real estates for payment of legacies in aid of personal estate, there

Burvell v.
Parker.
2 Vez. 363.

there was no case in which the court had said, *that* should make simple contracts carry interest; and that a trust term, though created by deed, was of the same nature; such a clause would not have the effect to turn simple contract debts, so far into the nature of specialty debts as to carry interest. And his Lordship rejected the authority of the case of *Car* and *Burlington*; being of opinion that what Lord *Harcourt* went upon, if he so decreed, did not appear, but he probably rested on some words in the deed, which were not stated in the report, Lord *Hardwicke* admitting that a clause might be so penned, as to show an intent in the testator, or settlor, to put simple contract debts on the same foot as specialty, as to carrying interest, and to put them on equality. And his Lordship, in the case of the Earl of *Bath* and the Earl of *Bradford*, again expressed his disapprobation of the case of *Car* and *Burlington*; and as to the case of *Maxwell* and *Wettenhall*, he considered that as too general a statement to be depended upon, especially where the discussion arose in a court of equity, where cases depended so much on circumstances; and his Lordship was rather inclined to think, that the question there arose on the Master's report, when it might be only as to giving interest from the particular time.

2 Vez. 527.
Shirley v.
Ferrers & Bro.
Chan. Ca. 41.
et Haslewood
v. Pope, 3 P.
Will. 323.
Ca. T. Talbot,
220.

1 P. Will. 228.
Note 1.
last Edit.

And it may be observed farther, that his Lordship's opinion as to the case of *Car* and *Burlington*, seems to be corroborated by the circumstance that in the Register's book, lib. A, 712, fo. 595, it appears to have been referred to the Master to see what was due to the judgment creditors, and to carry on interest, on such of the debts, *as in their* nature carried interest, which is the usual direction.

2 Vez. 587.

But Lord *Hardwicke* observed, in the above-mentioned case of *Barwell* and *Parker*, that if a man in his life-time created a trust for payment of debts, and annexed a schedule of some debts, and limited a trust term for the payment, that deed and schedule, being in the nature of a specialty, and giving a specific interest in the fund, would make the debts, though originally by simple contract, carry interest.

In the case of the Earl of *Bath* and Lord *Bradford*, the latter of whom, by his will, created a trust for payment of his debts, *viz.* that the trustees should, by mortgage or sale of a competent part of the estate, raise so much money to pay debts and legacies, as the personal estate was not sufficient to satisfy; Lord *Hardwicke* was inclined to

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think that a person, who joined with the trustees in paying off the debts, taking assignments of them, would be intitled to interest, considering his not as a simple contract demand, but, taking it against the executors, as a debt or demand arising by specialty, or a covenant under hand and seal. But the principal case turned ultimately upon very special circumstances.

And if simple contract creditors file a bill in such case for satisfaction of their debts, and to have a performance of such a trust by mortgage or sale of the estate for that purpose; there, from the time of the Master's report of the debts being confirmed absolute, the creditors will be entitled to interest thereupon.

Vid. Loyd v. Williams, 2 Atk. 108. et Brow. Rep. Chan. 43.

The principle upon which such debts carry interest, seems to be that they then become liquidated: There seems to be the same reason why they should carry interest, from the time they are allowed by the executors or trustees, in cases where no proceedings are instituted in equity.

If a mortgagee cancels a mortgage deed, and it is found in that state in his possession, it is as much a release as cancelling a bond;

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Harrison v.
Owen.
1 Atk. 520.

but it does not convey, or re-vest the estate in the mortgagor, for that must be done by some deed.

Idid,

And where it was doubtful, by whom a mortgage deed had been cancelled, an issue out of chancery was directed to try, whether certain mortgages were fairly cancelled by the mortgagee, or whether they were fraudulently, and by stealth, carried away by the mortgagor, and the seals cut off by him.

A bill in chancery by the mortgagee, to recover the mortgage deeds, pledged by a third person, will be retained, and is the only effective remedy.

Jackson v.
Butler
2 Atk. 306.

Thus, where a bill was brought by *A*, against *B* and others, for refusing to deliver two deeds, the one a mortgage, and the other an assignment of a mortgage, which were put into *C*'s hands, in order to receive the principal and interest, and who had abused his trust by pawning them to *S*; it was said, *per curiam*, that *A* might have had an action of trover, but then he could only have damages for the detaining, but not the deeds themselves, and therefore he

was

was proper in bringing a bill in chancery for the recovery of his deeds. There seemed to be little or no defence insisted upon for *B*, he could not have been imposed upon by *C*; for by the deeds themselves, *C* must appear to have no property. And *B* was decreed to deliver up the deeds, and left to his remedy for his debt.

A mortgagee has such an interest in the estate mortgaged, as that he may interfere in any suits respecting it without being guilty of maintenance; and, therefore, where it was urged in respect of a mortgagee, defendant, that the advancing of money towards carrying on a suit, to which the person to be affected, on the ground of being guilty of maintenance was no party, must be maintenance, unless where the person, so advancing money, was the husband, father, or guardian, and on that account allowed to disburse money; it was observed by Lord *Talbot*, that unless every advancing of money towards carrying on a suit for a third person, were maintenance (which he thought it not) the defendant could not be guilty thereof, because he appeared to be a party interested by virtue of a mortgage; and though he was no party to the suit, yet as he claimed a mortgage on the

estate, he might lay out money in supporting the title.

Opie v.
Godolphin.
Pre, Chan. 548.

If a mortgagee lends money on the security of an estate, in which a third person, not the mortgagor, claims a title, and of which the mortgagee has notice, but is at the same time advised by his lawyer, that the claim is ill-founded, and the mortgagee takes the title-deeds; if it proves otherwise, and the claim turns out a good one, he will be compelled in equity, notwithstanding such advice, to deliver up all the writings relating to it, to such claimant, except the mortgage deed, for the writings follow the estate. But he may retain the mortgage deed, if there be therein a covenant for the payment of the mortgage money, on which damages may be recovered.

3 Atk. 477.

Lord *Hardwicke* was of opinion, that a court of equity would not compel the mortgagee of an old Dean and Chapter lease, who should refuse, to surrender in order to a renewal; because he might have an objection to the lives proposed, and might insist the lives in being were better, or might oblige the tenant, the mortgagor, to propose other lives, or redeem him. But his Lordship said, would

would indeed be otherwise, if the mortgage were of a chattel interest, and lease for years only, if, upon surrendering the old, in which there was only a remainder of a term to come, a new and longer term were to be granted; because that would be an advantage to the mortgagee, as being a better security.

Where one has a mortgage, and also a bond as a security for the same debt, he may bring an action on the bond, and arrest the defendant, pending a suit in equity for a foreclosure; the mortgagee being at liberty to pursue all his remedies at once.

Burnell v.
Martin.
Doug. 417.

By the 7th *Ann. c. 19.* infants having estates in lands, tenements, or hereditaments, only by way of mortgage, are enabled by the direction of the Court of Chancery, or the Court of Exchequer, signified by an order made upon the hearing of all parties, concerned on the petition of the mortgagor or mortgagors, or guardian or guardians, of such infants, or person or persons intitled to the monies secured, by or upon any lands, tenements, or hereditaments, whereof any infant or infants are or shall be seised or possessed by way of mortgage, or of the person or persons entitled to the redemption,

R 4

thereof,

thereof, to convey and assure any such lands, tenements, or hereditaments, in such manner as the Courts of Chancery or of Exchequer shall, by such order so to be obtained, direct to any other person or persons, and such conveyance or assurance, so to be had or made, it is thereby enacted, shall be as good and effectual in law, to all intents and purposes whatsoever, as if the said infants or infant, were, at the time of making such conveyance or assurance, of the full age of one and twenty years.

And the same statute enacts farther, that all and every such infant or infants, being mortgagee or mortgagees as aforesaid, shall and may be compelled by such order, so as aforesaid to be obtained, to make such conveyance or conveyances, assurance or assurances, as aforesaid, in like manner, as mortgagees of full age are compellable to convey or assign their mortgages.

Ex Parte
Maire.
3 Atk. 479.
Comyns Rep.
615.

On a petition preferred to Lord *Hardwicke*, praying that an infant, the heir of a mortgagee in fee, who was likewise a *feme covert*, might convey by fine, under the last-mentioned statute, the Master reporting it necessary; his Lordship said, that this question came before him soon after he had the seals,
and

and that he consulted with Lord Chief Baron Comyns, who thought the court might order an infant, who was a *feme covert*, to levy a fine, for the act was general, that all persons under age should convey and assure; and that as a *feme covert* of full age could not assure, but by fine, the court might direct an infant *feme covert* to convey in the same manner in the present case.

In the last-mentioned case, there was only *ibid.* an affidavit of service on the husband, which his Lordship did not think sufficient, but directed it to stand over until the next day, that council might consent to the prayer of the petition for the husband, and the next day his Lordship made an order according to the prayer of the petition.

And in the case of *Zouch against Parsons*, it was held, that a lease and release by an infant, who was one of the executors, and heir of a mortgagee, of the estate mortgaged, made to a subsequent mortgagee, in consideration of the mortgage-money paid in, was binding upon the infant, upon the grounds that the fee which was in him was merely as a pledge for the money, and that besides the money, the infant had no beneficial interest in the land whatsoever; upon payment therefore

Zouch v.
Parsons,
1 Blackst.
Rep. 575.
3 Bur. 179.

therefore he was bound to convey as the mortgagor should direct, and, by the 7th of *Anne*, compellable to do it during his minority; that his conveyance was therefore a matter of form, and in the nature of an authority, executed by the mortgagor's direction in favour of a third person, who ventured his money upon the faith of it.

And it being found that inconveniencies frequently arose by lands mortgaged falling into the hands of ideots and lunatics, in order to remedy them it is enacted, by the statute of the 4th *Geo.* 2, c. 10, that from thenceforth it shall be lawful for any person or persons, being ideot, lunatic, or *non compos mentis*, or for the committee or committees of such person or persons, in his, her, or their name or names, by the direction of the Lord Chancellor, or the Lord Keeper, or Lords Commissioners of the Great Seal, by an order made upon hearing all parties concerned, on the petition of the person or persons, for whom such person or persons, being ideot, lunatic, or *non compos*, shall be seised or possessed in trust, or of the mortgagor or mortgagors, or of the person or persons entitled to the monies secured by or upon any lands, tenements, or hereditaments, whereof any such person or persons, being ideot,

ideot, lunatic, or *non compos mentis*, is, or are, or shall be seised or possessed by way of mortgage, or of the person or persons entitled to the redemption thereof, to convey and assure any such lands, tenements, or hereditaments, in such manner as the Lord Chancellor, Lord Keeper, or Commissioners of the Great Seal, shall, by such order so to be obtained, direct to any other person or persons, and such conveyance or assurance so to be had and made, shall be as good and effectual in law, to all intents and purposes, as if the person or persons, being ideot, lunatic, or *non compos*, was or were, at the time of the making of such conveyance or assurance, of sane mind, memory or understanding, or not ideot, lunatic, or *non compos mentis*, or had by him, her, or themselves, executed the same.

And that all and every such person and persons, being ideot, lunatic, or *non compos mentis*, and only mortgagee or mortgagees, or *non compos mentis*, and only such mortgagee or mortgagees, shall and may be empowered and compelled by such order so to be obtained, to make such conveyance or conveyances, assurance or assurances in like manner as trustees or mortgagees of sane memory, are compellable to convey or assign their mortgages.

*Ex parte Otto
Lewis, 1 Vez.
298.*

The language of the last-mentioned statute being, that "all persons, being lunatic, or the committee of such persons, shall convey," Lord *Hardwicke* doubted whether, on a petition grounded thereon, he could in general cases make such order where no commission of lunacy was taken out: But in a case where there had been a proceeding before a proper jurisdiction, namely, the Senate of *Hamburg*, where the lunatic resided, upon which he was found *non compos*, and a curator or guardian appointed for him and his affairs, which proceeding the Court was obliged to take notice of, his Lordship declared that the person was a mortgagee within this act, and ordered that, on payment of the mortgage money, there should be a conveyance to the mortgagor.

*Chapman v.
Emery.
Cooper,
Rep. 278.*

A mortgagee has been determined to be a purchaser within the 27th *Eliz. c. 4.*

*White v.
Hussey, Pre.
Chan. 13.
Warwick v.
Kniveton, 3
Atk. 291.*

Thus, where *A* and *B* were trustees in a term for 99 years, for raising a sum of money, and *C*, who had the reversion, settled it upon *B* and his heirs, in trust for his mother (who had conveyed it before to him) for her life, and after her death, if he survived her, then in trust for him and his heirs; but if she survived him, then to her and

and her heirs. Ten years after, *A* lent a sum of money to *C*, having had no notice of this second conveyance to *B*, and took a mortgage of these lands to trustees; *C* died, his mother surviving him. Then *A* set up his mortgage, and exhibited a bill against the mother of *C* and *A*, to set aside the former conveyance made by *C*, as being voluntary and fraudulent against him. And it was so decreed.

A fine and non-claim by a mortgagee in possession, will not bar the equity of redemption.

Plowd. 373.
Cruise on
Fines, 233.

And the rule of equity is the same in case a recovery be suffered by a mortgagee in possession; for, after such recovery suffered, and until the money be paid, the estate, in a court of equity, is still but as a security for the money lent; and, after the mortgage money is paid, the mortgagee is, in equity, in nature of a trustee for the mortgagor.

Stanhope v.
Thacker,
Pre. Ch. 435.
Cro. Ja. 593.

A mortgagee, *if in possession*, may gain a settlement by virtue of the mortgaged estate.

The King
against the in-
habitants of
Catherington,
3 Term, Rep.
771.

Producing a bond or mortgage is, *prima facie*, good evidence of a debt; but, it should seem, it would not avail if there were manifest

Piddock v.
Brown,
3 Will. 289.

fest signs of fraud in the obligee, or mortgagee; for, in such case, he ought to be put to the proof of actual payment; and though he may happen thereby to lose some part of the money really due to him for want of proof, this is but a just punishment for the fraud which it is evident he meant to be guilty of, and will be a proper discouragement to others from committing the like.

By the 9 *Ann. c. 5*, which requires that knights of the shire should have 600*l. per annum*, and every other member 300*l. per annum*, it is enacted, "That no person shall be qualified to sit in the House of Commons within the meaning of the act, by virtue of any mortgage, whereof the equity of redemption is in any other person, *unless* the mortgagee shall have been in possession of the mortgaged premises for seven years before the time of his election."

C A P. IX.

Of the Equity of Redemption.

AN Equity of Redemption is defined by Sir *Matthew Hale* to be “an equitable right, inherent in the land, binding all persons in the *post* (that is, coming in paramount to, and not under the title of the mortgagee) or otherwise;” and he says, that, in that respect it differs from the trust, which is collateral to the land, and created by contract of the party, who may provide for the execution of it; and, therefore, one who comes in in the *post*, and by a title paramount, as tenant by the curtesy, or lord by escheat, shall not be liable to it. In this, Lord *Hale* is not singular; Lord *Nottingham* (M. S.) says, an equity of redemption charges the land and is not a trust.

Hard, 160.
 1 Blackst.
 R. p. 146.

So

1 Blackst.

So Lord *Hardwicke* thought, that, in the eye of a Court of Equity, the equity of redemption was the fee simple of the land,

Ibid.

An equity of redemption will descend, may be granted, devised, entailed, and that equitable entail may be barred by a common recovery.

Thorp v.

Thorp,

L. Raym. 663.

2 Vent. 214.

Cro. Eliz. 768.

2 Bulst. 41.

And the common law will take notice, that the mortgagor has an equity to be relieved in chancery, and without doubt, a release of an equity of redemption is a very good consideration to maintain an assumpsit; for a court of law will take notice of a suit in chancery; and an assumpsit, in consideration of desisting from exhibiting a bill in chancery, was held to be on a good consideration.

C A P. X.

Who may claim the Equity of Redemption.

AS the mortgagor may, at any reasonable time, call upon the mortgagee to redeem, so likewise may any person claiming an interest under him.

And, therefore, where a man made a voluntary deed, and afterwards mortgaged the same lands, and the *first deed*, on trial at law, was found fraudulent against the mortgagee; yet, on a bill exhibited by the person to whom the deed was made to redeem the mortgage, it was held, that, though the first deed was fraudulent, because voluntary, as to the mortgage, yet it was good as to the equity of redemption, and would pass that; for a voluntary deed would bind the party that made it, and his heirs.

Ran. v. Cartwright, 1 Ch. Ca. 59.

2 Vern. 193.
Nelson, 101.
Et. Ca. Abr.

315. 1.
Barthrop v. West, 2 Rep. Ch. 62.

1 Ch. Ca. 71. Assignees of a bankrupt may redeem, or assign an equity of redemption.

Dougl. Rep. 22. So, likewise, a tenant may put himself in the place of the mortgagor, and either redeem himself, or get a friend to do it.
Keech v. Hall, supra, 187, 204.

Howard v. Harris, supra, 21. The assignee, in equity, may redeem a mortgage.

And an assignee of the equity of redemption, which has been deserted for a time, but not that period which is a bar to a redemption, will, if there are circumstances which would induce the court to decree a redemption in favour of the mortgagor or his representative, be entitled to the benefit of it.
Vid. infra.

Anonymous, 3 Atk. 314. Therefore, Lord *Hardwicke*, in a case, where a prowling assignee had bought an equity of redemption, which had been abandoned for fifteen years, for a very considerable sum, imagining, that from some knowledge of the law, he might be able to unravel a great number of circumstances, and by that means, entitle himself to a redemption, was of opinion, that he was entitled to a decree to redeem.

But

But though Lord *Hardwicke* decreed a redemption in the last-mentioned case, he did it only upon terms, which were, that the assignee, in taking the account before the master, should be confined to surcharge, and falsify only, and the interest upon the mortgage be computed at five per cent. though at that period money bore a higher rate of interest.

Ibid.

A mortgage by a popish heir may be redeemed by the next protestant heir.

Jones v. Meredith et al.
Bunb. 346.
Comyns Rep. 661.

An equity of redemption will follow the custom as to the legal estate. In borough English lands, if mortgaged, the equity of redemption will descend to the youngest son to whom the lands descend.

2 Vez. 304.

So, in mortgages of gavelkind, lands which descend to all the children equally, the equity of redemption descends to all likewise.

Ibid.

And it may be devised. Thus, where one, seised in fee simple, mortgaged his lands, with a proviso for repayment by him, his heirs, or assigns, and then devised the same premises, the court decreed, on a bill

Philips v. Hele.
1 Ch. Rep. 190. *et al.*
2 Burr. 973.

by the devisee to redeem, that the equity of redemption belonged to him and not to the heir.

Turner v.
Gwinn, 1
Vern 41.

It was said in the case of *Turner* and *Gwinn*, that a tenant in tail of an equity of redemption, may devise it for the payment of debts.

Amhurst v.
Litton,
Fitzgib. 99.

But where *A* being seised of the lands in question in fee, mortgaged the same for two several terms of 1000 years each, and afterwards made his will, by which he devised those lands to *L L*, his heir at law, and to the heirs male of his body, remainder to *S B*, for life, with contingent remainders to his first and other sons in tail, remainder to *G D* for life, with remainder to his first and other sons in-tail, remainder to his own right heirs, and died: Afterwards *L L*, being seised of the lands in question under the will, and also of other lands in fee of a very considerable yearly value, made his will, by which he bequeathed to dame *M S*, his loving mother, the sum of 2000*l.* and then directed and appointed, that his executor should pay off and discharge all mortgages and incumbrances laid and charged upon his estate in *Suffex*, being the lands in question, and particularly mentioned the two aforesaid mort-

mortgages for years, and then directed and appointed that the said several mortgage leases should be kept on foot ; and upon payment of the several sums of money due upon the same, should be assigned by the mortgagees to his mother dame *MS*, for her sole use and benefit, during the remainder of the several terms, in the said several mortgages contained ; and farther devised a yearly rent-charge of 100*l.* to his mother for her life, to be issuing out of all his manors, &c. in the several counties of Hertford and Bedford. Then the will went on—"and as for and concerning all and every my manors, messuages, lands, tenements, and hereditaments, which I the said *LL* am now seised of in law or equity, or which I have a power to give or charge, I do give and dispose the same in manner following"—and then he appointed, that if his wife proved with child, and such child should be a son, that his son should have all his aforesaid manors, &c. in tail, remainder to his cousin *WL*, the defendant in the original cause, and to his heirs : And if the said after-born child should prove a daughter, he appointed that 5000*l.* should be raised out of the profits of his said estate for such daughter ; and if his wife were not with child at the time of his death, then he devised all his said manors, &c. to his said

cousin *W L*, and his heirs for ever. The testator died, his wife not having been with child. *S B*, and *G D*, both died without issue. Then the plaintiff, as representative to dame *M S*, brought a bill, praying an assignment of those terms; and the defendant brought a cross bill, praying to be let in to redeem as devisee of the reversion by the will of *L L*. And the question was, whether the equity of redemption, which the testator had, incident to the reversion in fee, as heir at law of the mortgagor, was severed from the reversion by the devise, and given to dame *M S*; and so those terms vested in her irredeemable by the devisee of the reversion; or whether those terms were devised to her only as securities for the original mortgage money, and so subject to be redeemed by him, that should have the inheritance. And it was decreed by the Lord Chancellor,* assisted by Lord Chief Justice *Raymond*, and Mr. Justice *Denton*, that the devisee of the reversion under the will of *L S*, should be let into redeem; for that the testator did not otherwise intend these mortgages for his mother, than as securities for so much money. The words of the will, *AS FOR ALL*, plainly showed the testator

* Lord King,

took it, that he had not before given away any part of his estate ; but notwithstanding, if the former part of the will, under which the mother would claim the equity of redemption, were full and exprefs to that purpose, those general words would not abridge it ; he appointed “ those mortgage leases to be assigned to her sole use and benefit, during the remainder of the several terms in the said mortgages contained,” which words, taken altogether, had no special meaning to convey the very interest ; the latter words in this sentence were to be guided by the former, and so they were but words of course in all assignments of mortgages : The reversion was undoubtedly devised to the defendant, and it could be of no use to him, if the equity of redemption should be construed to have passed to the mother, who was therefore appointed only to take the estate of the mortgagees : There was no reason to think the testator meant to give her any thing out of his reversion, for an odd construction would follow ; she then would have a term barrable by a recovery for a part, for whatever rose out of the reversion was subject to be defeated by common recovery, but her antecedent term could not be touched, which the Chancellor declared incidentally, his Lordship and the Judges founding their opinion upon the will.

2 Chan. Ca. 8. But if a mortgagor before the condition broken devise, it will be void; for a condition is not devisable.

2 Vez. 431. Every devisee of a mortgaged estate, that brings a bill to redeem, need not make the heir at law party; if the devisee claims to have the will established, it is necessary: if only a title under the will, it is not.

Shirley v.
Watts,
3 Atk. Rep.
200.
Angel v.
Draper,
1 Vern. 399.

A judgment creditor may redeem against a mortgagee of a leasehold estate, who is likewise a bond creditor: but, before the bill is brought to redeem, *a writ of execution* must be sued out; for until that be done, the judgment creditor hath no *lien* on the leasehold estate, and, for want of its being taken out, the bill in the principal case was dismissed.

King v. Mar-
rissal, cited in
the principal
case.

Bunb. 347.
2 E. C. Abr.
594, notes.

Tenant by *elegit*, statute merchant or staple may redeem,

Stonehewer
v. Thompson,
2 Atk. 440.

And the law is the same as to a judgment creditor, though the judgment be with stay of execution. As where *H*, in 1693, confessed a judgment, with a defeasance, by which it was not to take effect until after the death of a woman, who lived until 1726. The estate, subject to this judgment, descended in

in the mean time from *H* to his heir, who mortgaged it to *T*. The mortgagee had no notice of the judgment at the time: the heir afterwards, in 1721, about five years before the woman died, became bankrupt; and the mortgagee was appointed assignee. After her death, the representative of the judgment-creditor brought his bill against the assignee to redeem the mortgage, upon payment of principal, interest, and costs. The question was, whether, as there was no actual *elegit* taken out by the judgment-creditor before the commission of bankruptcy issued, the assignee under the commission, *qua* such, or the judgment-creditor, should redeem? And it was contended on the side of the assignee, that the heir was chargeable *only* as *terre-tenant*; and therefore the person *who* claimed under the judgment was *not* a creditor of *the bankrupt*. *Sed per curiam*: The judgment-creditor is entitled to redeem the whole (for it must be entire) and to have the estate of *H* exonerated out of that of his heir, if the heir's is sufficient. As to the point which had been laboured, in order to make this person come in as a creditor under the commission of bankruptcy, there was nothing in it. If it had been merely a bond-creditor from the ancestor, there might have been some colour to insist upon
this

this under the statute of fraudulent devises; because that act made it a debt against the heir himself, as well as the ancestor. But it was entirely different here, as this was a *judgment* which was a *lien* upon the land, *a fortiori* a *lien* upon the lands in the hands of the assignee under the commission, who stood only in the place of the bankrupt.

Attorney
General v.
Crofts *et al'*.
1 Brown's
Par. Ca. 22.

The crown may redeem estates mortgaged, forfeited by the mortgagor by his being indicted and outlawed for high treason.

Palmer v.
Danby,
Pre. Ch. 137.

If an estate descend to an infant subject to incumbrances, the guardian may, without the direction of a court of equity, apply the profits to discharge the incumbrances, *viz.* to pay the interest of any real incumbrance, and the *principal* of a mortgage; because that is a *direct and immediate* charge upon the land; but *not* the principal of any other real incumbrance.

Howard v.
Harris, *supra*,
page 21.
Ch. Ca. 271.
Palmer v.
Danby,
E. Ca.
Abr. 219.
S. 6. S. Pre.
Ch. 147.
Haymer v.
Haymer,

A jointress may redeem, and although the jointure be secured only on part of the estate, yet she may redeem the whole; so she may, though part of it be settled on her after marriage; and, if she pays more than a third part of the principal money, she shall hold the lands until reimbursed.

And

And an husband may be tenant by the curtesy of an equity of redemption.

2 Vent. 343.
2 Cha. Ca.
99, 100.
prec. Ch. 237.
infra.

Thus, where the father of the plaintiffs devised to *Anne* his daughter, the plaintiffs elder sister, all his estate freehold and copyhold in fee, charged with 200 *l.* a-piece to the plaintiffs: *Anne*, after her father's death, possessed the several estates, and married with the defendant *Inglis*. Soon after *she* died leaving issue a son, who died an infant and without issue; upon his death the plaintiffs, being heirs at law both to the infant and their sister, became entitled to the real estate. *Anne Inglis*, before her marriage, mortgaged part of the freehold premises to the defendant *Scarfe* for 900 *l.*: the bill was brought against the mortgagee and the husband for an account, and for the direction of the court.

Casborne v.
Scarfe Inglis,
1 Atk. 603.

The defendant, the husband, insisted that, ^{Ibid,} having had issue by his wife, he was entitled to an estate for life in his late wife's freehold premises as tenant by the curtesy, subject to the mortgage of the defendant; and the Master of the Rolls, on hearing the cause, was of opinion, the defendant *Inglis* was not entitled to a tenancy by the curtesy in the estate, comprized in the mortgage,

gage, and decreed accordingly. But this decree was reversed on appeal to Lord Chancellor *Hardwicke*, who, in giving judgment on this point, said that the question depended on two considerations; first, on what sort of interest an equity of redemption was considered to be in that court: secondly, on what was necessary to entitle a man to be tenant by the curtesy. First, an equity of redemption had always been considered as an estate in the land, for it might be devised, granted, or entailed with remainders; and such entail and remainders might be barred by fine and recovery: and therefore it could not be considered as a mere right only, but must be taken to be such an estate whereof there might be a seisin. That the person, therefore, entitled to the equity of redemption was considered as the owner of the land, and a mortgage in fee was taken to be personal assets. That, by a devise of all lands, tenements, and hereditaments, a mortgage in fee would not pass, unless the equity of redemption were foreclosed; and that if, after such devise made, a foreclosure was had, yet such estate would not pass by those general words, of lands, tenements, and hereditaments; because a foreclosure was considered as a new purchase of the lands. That the interest of the land must be
some-

somewhere, and could not be in abeyance; but it was not in the mortgagee, and therefore must be in the mortgagor. That it was certain the mortgagee was not barely a trustee to the mortgagor, but to some purposes, namely, with regard to the inheritance, he certainly *was*, until a foreclosure. Secondly, at common law, four things were necessary to entitle the husband to be tenant by curtesy, *viz.* marriage, issue, death, and seisin in fact. In this case the three first concurred, but it was objected, that here was no seisin whatever of the legal estate in the wife in the consideration of law. However, that was not the present question; the true question was, whether there was such seisin or possession of the equitable estate in the wife, as, in *that court*, was considered as equivalent to an actual seisin of a freehold estate at common law? And his Lordship was of opinion, that there was. *Actual* possession, clothed with the receipt of the rents and profits, was the highest instance of an equitable seisin, both of which there was in this case; and that a husband should be tenant of the curtesy of the equitable estate of the wife, had been often determined. It was so held in *Sweetapple v. Bindon*, which was a much stronger case than this; for, in that case, there was neither

Sweetapple
v. Bindon,
2 Vern. 536.

ther seisin nor land: and, in 2 *Vern.* 680, it was held that lands, articted for only, would pass by a will.

Ibid.

His Lordship said, the principal objections to the husband's claim were two: first, laches and neglect in the husband by not paying off the mortgage. Secondly, that the rule ought to be equal between dower and curtesy, and that dower could not be of a trust-estate.

Ibid.

As to the first, it was not similar to the cases of laches in the husband, *viz.* as in a case where entry was requisite; because it was nothing near so easy to pay off a mortgage as to make an entry: and it held equally strong in the case of a trust-estate; for a husband might more easily get a decree for his trustees to convey, than a decree to redeem a mortgage, which was necessarily attended with many delays.

Ibid.

The second objection proved too much, if any thing, and entirely failed by the precedents of that court: if any innovation were to be made, his Lordship was of opinion, that the nearest way to right would be to let in the wife to dower of a trust estate, and not to exclude the husband from being tenant

tenant by the curtesy of it. There could be no inconvenience to the heir at law, for he would have the same remedy in this court, to make a tenant by the curtesy keep down the interest, as against any other tenant for life. For these reasons his Lordship was of opinion that the defendant was entitled to be tenant by the curtesy, and the decree at the Rolls, as to this part, must be reversed.

But, in order to entitle the husband to be tenant by the curtesy of the trust-estate of his wife, the wife must have the inheritance; *and there must likewise be a seisin of a freehold during the coverture*; and, therefore, where freehold, copyhold, and leasehold estates were devised by a father to trustees, &c. in trust to apply the residue, after paying their own charges, to the sole and proper use of his daughter, during her life, and to be at her disposal, and not subject to the debts or controul of her husband, her receipts to be good; and to permit her by deed or writing, executed in the presence of three or more witnesses, notwithstanding her coverture to give and dispose of all his freehold, copyhold, and leasehold estates, as she should think fit: Lord *Harwicke* held, that the husband was not entitled to be tenant by the curtesy, upon the

Hearle v.
Greenbank,
1 Vez. 298.

the ground of the husband's having no *seisin*, either in *law* or *equity*: for though the wife had the inheritance, and there was a kind of *seisin*, *that* was an equity, a trust of the profits for her life; but the father, whose estate it was, had made his daughter a feme sole, giving her the profits during her life, *but not subject* to the controul of her husband. Then the husband had no *seisin* in equity during the coverture; and this was essential to a tenancy by the curtesy; and such tenancy, in this case, would be directly contrary to the intent of the testator.

268.

If a prior mortgagee does not bring an ejectment to recover possession, and the interest runs in arrear, a subsequent mortgagee shall, notwithstanding, not be permitted to redeem, without paying the whole interest to run on; because, though the second mortgagee could not enter, he was not without remedy; for he might have brought a bill to redeem, and so had the estate himself: but if he does not, the Court of Chancery has often appointed a receiver to keep down the interest, which the court will not in general do, unless where the prior mortgagee will not enter: but if he does not take that remedy, he shall not redeem without paying that arrear: and though a mortgagee often
suffers

suffers the arrear to run on, with a design to get in the estate, on which he lent his money, and become the purchaser, which may be called an ill intent, yet he shall not lose his interest.

A subsequent incumbrancer may redeem a former one.

And where there was a mortgage, and the mortgagor afterwards acknowledged three judgments to other persons for other money due, two of the persons to whom the judgments were given (to the intent that, the mortgage being set aside, they might take out execution on their judgments) gave notice to the mortgagee thereof, and requested him to accept of his money, which, they said, they were ready to pay to him; and desired him to appoint a time when, and they would pay him within a fortnight. It was in proof that no money was actually tendered: afterwards, the mortgagee exhibited a bill, and had a decree to foreclose, and then took a farther absolute conveyance from the mortgagor for a considerable sum of money. The two creditors, on a bill exhibited, had a decree against the mortgagee to pay them their money; but the third credi-

Greswold v.
Marlham,
2 Ca. Ch.
170.
Crisp v.
Heath,
7 Vin. Abr.
52. pl. 2.

tor had no relief, because he did not give notice in time of his judgment.

*Morret et al.
v. Westerne,
2 Vern. 663.*

But where the defendant, after ten years suit, four several reports, and two trials at law, obtained a decree to foreclose upon a mortgage ; and the plaintiffs had judgments and other incumbrances on the estate subsequent to the defendant's mortgage, and the bill was brought by the plaintiffs for an account of profits, and to redeem ; the defendants pleaded all the former proceedings, the taking the account in an adversary way, report, references, trials at law, and the decree signed and inrolled, in bar of any new account to be taken, and denied notice of the plaintiff's incumbrances ; but the plea was over-ruled.

There is a clear distinction between the preceding and the last case ; in the former an actual purchase was completed and covered by the mortgage, which could not be impeached but by a creditor of whom the purchaser had notice ; in the latter there was only a decree for a foreclosure, which did not affect the judgment-creditors as to their right of redemption.

Redemption of a mortgage may be had against the King.

Pawlet v.
Attorney General,
Hard. 465.

A mortgagor may redeem, *even* after a release of the equity of redemption, if it appear, by circumstantial proofs, that it was made upon a secret trust and for his benefit.

Thus, in the case of *Moreley* against *Elways*, where the plaintiff and his father, in December 1641, made a mortgage to the father of the defendants, the plaintiff's suit was to have redemption. The defendants set up a release made by the plaintiff in 1646, of all his equity of redemption, and a decree made by the Lord Chancellor *Hyde* in this cause, in 1663, which decree was penned as if made by consent. This decree being signed and inrolled, and the plaintiff not being able to perform the same, he could not have a bill of review, nor could he have been relieved by such bill, if it had been brought, the release barring all his pretensions; and that being upon a secret trust, he could not prove the trust positively, the witnesses being dead; wherefore he was not relievable either in law or equity. The plaintiff petitioned the House of Lords for relief against the decree and release. The

Moreley v.
Elways et al.
1 Ch. Ca.
107.
Trin. 1668.

proofs offered to evidence the trust were circumstantial, and not direct positive proofs. They went principally to show, that the debts due from the plaintiff and his father, were small in comparison with the value of the estate at the time of making the release. These proofs being read, and it appearing clearly thereby, that the value of the lands was much greater than to make a satisfaction for the debt for which it was released, it was determined to be a trust; and the cause was referred back to the court to be proceeded upon, as in the case of an equitable mortgage, which their Lordships adjudged it to be. Afterwards the cause was reheard in court, when a decree was made for the defendants to come to an account, and the plaintiff to be admitted to the redemption of his estate.

And if there be tenant for life, with remainder or reversion in fee of an equity of redemption, they shall contribute proportionably what is due on the mortgage.

So, a devisee of an estate for life, in an equity of redemption, may redeem and hold over until those in remainder contribute.

And

And in such case the general rule is, that the estate of the tenant for life in the premises shall be rated at one third, and that of the remainder-man or reversioner in fee at two thirds of what is due for principal and interest.

Rowell v.
Walley,
1 Rep. Ch.
221.
Ballet v.
Spranger,
Prec. Ch.
62. Verney v.
Verney, 1 Vez.
428.

And if the mortgage-money is payable on a contingency not arrived, he in remainder or reversion may exhibit his bill *quia timet*, against the tenant for life, and the tenant for life shall be decreed to contribute.

Hayes v.
Hayes,
1 Cha. Ca.
223.

And if the tenant for life of the equity of redemption pays off the mortgage, and has the term assigned over in trust for himself, and makes improvements, and dies; and afterwards the remainder-man or reversioner comes to redeem; the representatives of tenant for life shall have the allowance of two thirds of the lasting improvements, but nothing for the other third, because he received the benefit thereof during his life; and no interest shall be allowed during the life of tenant for life for the money he paid, for he is bound to keep down the interest during his estate.

Newling v.
Abbot,
Easter,
1 Geo.
Vin. Abr.
185. Ca. 8.
letter a.
Sc. 2 Eq. Ca.
Abr. 596. 11.

A distinction is made in computing the value of the life, where the application is

Clyat v.
Batteson,
1 Vern. 404.

T 3

during

during the life of tenant for life, and where after his death. For where lands in mortgage were devised to *A* for life, remainder to *B* and his heirs; *A* entered, bought in the mortgage, took an assignment in trustees names, and died. *B*, the remainder-man, preferred his bill against the defendant, the representative of *A*, to redeem. It was insisted, by *B*'s counsel, that he ought to pay but two thirds of what was due on the mortgage, and that the other third ought to be allowed by the defendant, by reason the tenant for life enjoyed the profits during his life. But the court said, had the application for redemption been in the life-time of the tenant for life, that then he should have been allowed a proportion of the money, in proportion to the value of the respective estates of the tenant for life and the remainder-man; but he being now dead, and having enjoyed the estate but one year only, the defendant must make an allowance *only*, for the time that *A* enjoyed the estate.

James v.
Hailes,
Prec. Ch. 44.

In the case of *James* and *Hailes*, it is laid down that, if an estate in mortgage be settled on *A* for life, and then on *B* in tail or in fee, the tenant for life shall bear two fifths of the principal and interest, and the remainder-man three fifths,

But

But where he who is possessed of the equity of redemption, hath such an interest in the estate, as he can *secure* the money laid out by him to redeem upon, the remainderman shall pay him, or his representatives, *all* he hath advanced,

As where a *tenant in tail* of a mortgaged estate, under the will of his father, upon the death of his two brothers, paid off a debt originally on the estate by mortgage term for years, but neglected to have an assignment of the term to himself, and afterwards devised the same lands; and the plaintiffs, the remainder-men under the will, claimed the estate, as not barred, discharged of the incumbrance. The Lord Chancellor held, that there being a term for years in the mortgagee, which stood in point of law as it did before, no assignment in law being made thereof, none of the parties before the court had the legal estate, for a conveyance of which the plaintiffs came; and therefore *that* conveyance must be upon equitable grounds. That, so far as it appeared, tenant in tail paid it off with his own money; that he might have taken an assignment of the term, either in trust, to attend the inheritance, which would have ended this question, or in trust for himself, his execu-

Kirkham v.
Smith,
1 Vez. 258.

tors, or administrators, which would, notwithstanding the remainder over, have kept this incumbrance on foot for the benefit of his personal estate and those entitled thereto; or, that he might have called for an assignment of it in his life, if he had found out this limitation in remainder, that it might have been made for the benefit of his executors, *not* of the remainder; but his not doing any of these, clearly proved, that he took himself to have had the absolute ownership and disposal of it. And the court could not decree, to persons claiming this, in contradiction to his apprehension and intent, a conveyance of the inheritance, and likewise of this term, without making a satisfaction to the personal estate of the tenant in tail; as that would be contrary to the maxim, *that he who would have equity, must do equity*; and the plaintiffs were decreed to have the estate, subject to the money paid by the tenant in tail in discharge of the mortgage.

Kerton's case,
Cro. Car. 87.

A man mortgaged upon condition, that if he or his heirs repaid 100*l.* at such a day he should re-enter: he died, leaving issue a daughter only, his wife being *previement enfiert* with a son, the daughter and heir at the day paid the 100*l.* and afterwards the son

son was born; and whether the son should enter upon the sister, or she should retain it for ever, was the question? And it was held by *Hide*, Chief Justice, *Walter*, Chief Baron, *Denham*, *Hutton*, *Whitlock*, *Harvie*, *Yelverton*, and *Croke*, that the sister should retain it against the son, born after the performance of the condition; for in as much as she paid the money (*and if she had not paid it, the land had been lost*) if she could not retain the land against the son, she had no remedy for the money, and by payment thereof she had gained the land, and was in as a purchaser, although she were entitled thereto by the condition, and as heir, and she should retain it, as she should the perquisite of a villain, and as land gained by her vigilancy; for otherwise it should be lost to both, and she should lose both land and money, therefore the law willed that she should retain the land. But *Richardson*, Chief Justice of the common bench, and *Dodderidge*, held strongly the contrary, because she had it as heir, and then the nearer heir being born, should defeat her title; and it was in her *voluntary* act to pay the money, which she might well have omitted, and she paid it of her own head, and at her own peril: *Jones* and *Trevor*, puisny Barons, doubted thereof, and would not deliver any opinion, but rather inclined that the son should have it.

The

The degree of pressure under which money so circumstanced should be paid, would, it is presumed, at this period, decide to whom the equity of redemption should belong. If a daughter so predicamented should pay money due upon mortgage to prevent an actual foreclosure, and, to save the inheritance, should satisfy the condition on the point of being forfeited in equity as well as at law; there seems great reason that a son born after should not divest it, because if the daughter had not performed the condition, the land had been utterly lost, and *qui sentit onus, sentire debet et commodum*. But if a daughter so circumstanced should officiously pay off the mortgage in order to vest the estate in herself, it should seem the equity would be against her, because the condition being saved in equity, notwithstanding the forfeiture at law, would descend to the after-born son, and the act of the daughter being voluntary, would not fall within the maxim alluded to. She therefore could only be considered as a trustee for the heir,

Sawley v.
Gower,
2 Vern. 61.
Placknet v.
Kirk,

1 Vern. 411.
2 Atk. 294.
2 Vern. 54.
Cont. Bennet

An equity of redemption of a mortgage in fee is not assets at law, because the estate is forfeited; and if a specialty creditor bring an action against the heir, the heir may plead *riens per descent*; but the heir having a right

a right in equity, *that is in equity liable to satisfy debts.*

v. Box, cited
1 Vern. 410.

Quære if before the statute of the fraudulent devises?

And if the heir aliens, or releases his equity of redemption, to prevent the creditors from having a satisfaction for their debts, the Court of Chancery will follow the money in the hands of the heir or executor,

But where one who was obligor in a bond, had in his life-time made a mortgage of some lands, of which he was seised in fee, for more than the value; and the mortgagee offering the lands in sale, the purchaser would not proceed, unless the heir of the mortgagor, who was also heir of the obligor, would join in the conveyance, and the heir had 200 l. of the mortgage money for joining; the question was whether this 200 l. was assets? Lord Chan. This is not assets, having been paid to buy off the obstinacy of the heir, not for the value of his equity, which was worth nothing.

Dunn v. Green, 3 P. Will. 10.

Where a man, possessed of a term for years, made a mortgage of it to *A*, and afterwards acknowledged a statute to *B*, and then confessed a judgment to *C*, the bill was to have the equity of redemption of this term, which was vested in the executor, and so become assets,

Morgan v. Sherrard,
1 Vern. 293.

assets, to be administered in a course of administration, and subjected to the judgment; a judgment in a course of administration at law, being to be preferred to a statute. It was insisted, on behalf of *B*, that he had the statute, and that having got the term extended in the hands of the executor, a subsequent judgment could not avoid that extent. But the Lord Keeper was of opinion, that a term for years was not extendable by the *conuse* of a statute in the hands of an executor, and though it were extendable in the lifetime of the *conusor* in his hands, yet the extent was but *quousque*, and if the *conusor* aliened the term before extent, the statute bound not the term. And then, if it were not extendable in the hands of the executor, it was but a chattel, like a jewel or a horse, and then a judgment must be preferred in course of law to a statute.

But such equity of redemption of a term for years, it is presumed, may be considered as equitable assets only, and then it seems that the creditor, by judgment and by statute, would be entitled *pari passu*.

Creditors of
Sir Charles
Cox,
3 Will. Rep.
341.

Thus where *C* made a mortgage, and died possessed of the equity of redemption of a term for years, leaving greater debts than his

his estate would pay; a question arose in Chancery, whether this mere equity of redemption was only equitable assets and distributable equally, *pro rata*, among all the creditors, without regard to the degree or quality of their debts; or, whether it should be applied in a course of administration; in which case, the bond creditors would swallow up all the assets without leaving any thing for the creditors upon simple contract? And it was solemnly determined, that this equity of redemption was equitable assets only; for, the mortgage being of the *whole* term, and forfeited at law, and the right of redemption being *barely* an equitable interest, it was reasonable to construe it equitable assets, and consequently distributable amongst all the creditors, *pro rata*, without having respect to the degree or quality of the debts; all debts being, in a conscientious regard, equal, and *equality the highest equity*.

A bill in chancery was filed to be relieved against the heir of the mortgagor for money received after his father's death, for a release of an equity of redemption. *Finch*, Lord Keeper, conceived this was no assets in law to satisfy a judgment acknowledged by the mortgagor after the mortgage, and before the

Freeman v.
Taylor, 3
Keb. 307.

the release ; for being but a bare right, and not being assets in law, the release being before the bill exhibited, was not fraud, and so not assets in equity.

But this distinction, on the ground of the judgment having been acknowledged after the mortgage, and so not attaching upon the equity of redemption, as being but a bare right, seems to be done away ; now such equity is considered as a title, and as imitating the legal estate in all respects, even more closely than a trust.

Cole v.
Warden,
1 Vern. 410.
Maffam v.
Harding,
Exchequer
1734.
Spencer v.
Biffin, at
Rolls, Mi-
chaelmas
Term. 1734.
1 Salk. 354.

If lands in fee be mortgaged for a term of years, the reversion in the mortgagor, expectant upon the determination of the term for years, will be *assets* at law liable to debts, and attract the redemption. In such case, although the mortgage be for a thousand years, yet the bond creditor may have judgment against the heir of the obligor, and a *cesset executio*, until the reversion come into possession.

Fortrey v.
Fortrey,
2 Vern. 134.

But the judgment will be of assets *quando acciderint*, and the creditor cannot, by a bill in equity, compel the heir to sell the reversion, but must expect until it falls.

Where

Where creditors are plaintiffs, the usual claim is, that the debts shall be paid in the course of administration; but that is to be intended of legal assets, and not of assets in equity that are not assets at law.

An equity of redemption is devisable for payment of debts.

Sawley v.
Gower,
2 Vern. 61.

Hard. 469.
Turner v.
Gwinn,
1 Vern. 41.

It was formerly held, that if an equity of redemption were devised for payment of debts, a distinction was to be taken in the application of the assets, where lands mortgaged were devised for payment of debts generally; and where the devisee for payment of debts was made executor. In the former case the assets were considered as equitable, and all the creditors as equally concerned and entitled, and that none were to be preferred before the other. Statutes, judgments, bonds, or simple contract debts, *if they did not attach upon the very land so devised*, were to be paid in proportion, and by average; and so of other equitable incumbrances. But in the latter case, the equity of redemption, in the hands of the executor, was considered as legal assets, and he was obliged to pay debts on specialty before debts on promises: the former having an artificial preference at law, though naturally,

and

Child v.
Stephens,
1 Vern. 101.
2 Ch. Ca. 54.
Hixon v.
Wytham,
1 Cha. Ca.
248, 249.

and in conscience, a debt by contract without specialty is as justly due as the other.

Girling v.
Lee,
1 Vern. 63.
Hixine, v.
Mortley, cited
in Girling v.
Lee.

Thus, where *A*, having made a settlement on lands which he covenanted were of a certain annual value, mortgaged all his other lands, and then confessed a judgment defeazanced on payment of a sum certain; afterwards *A* made his will, and devised all his lands for payment of his debts, and constituted the devisee in trust for payment of debts, executor. A bill was filed by the judgment creditor to have the trust performed and his debt satisfied. The defendant's answer admitted the devise for payment of debts, but set forth the jointure, covenant, and the mortgage, and that the lands jointured were not of the value for which they were given. The question was, whether the debt upon covenant and that upon judgment should be paid *pari passu*, or whether the latter should be first discharged? And it was decreed, that the lands should be sold for payment of debts, according to the trust in the defendant's father's will, and that the plaintiff should be let in for a satisfaction of his judgment, without regard had to the covenant for making good the jointure.

And where lands mortgaged were devised to a trustee for payment of mortgages and specific legacies, though the remainder was given to him in fee, yet the *trustee* being made *executor*, the *equity of redemption* was considered as *legal assets* in his hands.

Thus, were *A* having mortgaged copyhold lands, afterwards surrendered them to the use of his will, and then devised them to *B* in trust, in the first place, to pay off and discharge the mortgages on the said land; and, in the next place, to pay several legacies, particularly a legacy of 200*l.* to the plaintiff's wife, *the remainder in fee to B*, and made *B* his *executor*. *B* proved the will, and paid debts not on mortgage; and to raise money for that purpose, made several new mortgages of the lands in question. The plaintiff exhibited his bill for satisfaction of his wife's legacy and to redeem, insisting, that after the mortgages made by *A* were discharged, the lands should stand charged with his legacy, and that it should not be postponed to the new mortgages made by *B*. But it was resolved that the plaintiff could not be admitted to redeem part without redeeming the whole; for *B* was not *only a trustee* for payment of debts, but also *executor* to the devisee; that the lands in his hands were

Brunt v.
Best et al.
2 Vern. 69.

legal assets, charged with *all* the debts of the testator, and, by consequence, with the new mortgages made by *B*, the money having been raised by him for payment of the debts of the testator.

The grounds upon which the decision in the two foregoing cases is founded, seem to have been, that the lands being devised for payment of debts, and for that purpose given to the executor, he took them as executor, and not as devisee of the inheritance.

Deg v. Deg,
2 Will. 412.
S. L. Lewin v.
Okeley, 1 Atk.
50.

But it was held, in the case of *Deg v. Deg*, which was a devise of lands, mortgaged, to trustees, *who were likewise* nominated executors, that the premises, *being mortgaged in fee* by the testator, and he having *nothing* but an *equity* of redemption, *that* could be only *equitable assets*, and consequently *must* go amongst all the creditors equally.

Lewin v.
Okeley,
2 Atk. 50.

And at present the better opinion seems to be, that although lands be devised to trustees for payment of debts, *who are likewise* constituted executors, yet they will be considered as *equitable assets*. Thus where a devise was to trustees for payment of debts, and the *same* persons

persons were made *executors*, the court said, that the assets should, notwithstanding, be *equitable* and not legal; for, though there were cases in *Vernon's Reports*, in which it was held, that where trustees were made executors, debts should be paid in a course of administration (*vid. Girling v. Lee*) yet the modern resolutions had been otherwise.

Vid. Supra,

It is likewise said to have been settled in the time of *Wright*, Lord Keeper, in a cause between *Herbert v. Herbert*, upon consideration had of all the former cases, that where lands are devised for payment of debts and legacies, the debts being such as have no lien upon the lands, as debts by simple contract, &c. the debts should have no preference; but if there were not sufficient to pay all, they should be paid in proportion, (although it was otherwise held in Lord *Nottingham's* time, who used always to say that a man ought to be just before he was bountiful.) The reason seems to be, because the will of the owner alone makes the land liable, and that gives no preference expressly or impliedly to one before the other.

Herbert v. Herbert,
2 Freem. 270.
Sc. 2 Eq.
Ca. Abr. 371.
Sed vid. cont.
Hixon v. Wytham,
Cha. Ca. 248.
Sc. supra et
1 Mod. Rep.
117.
Whitton v. Lloyd,
1 Cha. Ca.
275.

If a mortgage be made of lands, and afterwards more money is raised by subsequent mortgages; and then the mortgagor, by

Child v. Stephens,
1 Vern. 101.

deed in his life-time and by will, conveys and settles all his lands *unto trustees* for payment of his debts, by which they become equitable assets, the subsequent mortgagees having a security for their money by a lien upon the estate, which the court will not take from them, and, in preservation of their own interest, a right to redeem shall be first satisfied; although the estate in question was in the first mortgagees, and the subsequent mortgagees had only an equity.

If a devise be of the equity of redemption of a *trust-estate* by the *cestui que trust*, subject to the payment of his debts, notwithstanding *the devisee be heir at law*, yet the equity of redemption shall be equitable assets.

Plunket v.
Penfon,
2 Atk. 290.

Thus where *Penfon*, the testator, who was the *cestui que trust* of a real estate, made a mortgage of it in fee; and, the equity of redemption being in him, he, by his will, gave and devised to his dear son and to his heirs for ever the mortgaged premises, subject nevertheless to the payment of his debts, annuities, and legacies, and then died indebted by bond and simple contract; one question was, whether an equity of redemption of a mortgage in fee of a trust-estate ought

ought to be considered as legal or equitable assets? Lord *Hardwicke*, in giving judgment on this case, admitted that, if a mere trust-estate descended upon an heir at law, it would be considered as legal and not as equitable assets; which was founded upon the third clause of the statute against fraudulent devises, that gave a specialty creditor his remedy at law by an action of debt against the heir of the obligors. But his Lordship said, that the statute had not made a mortgage in fee of a trust-estate subject to the same thing; that if the plaintiff was under the necessity of coming to Chancery for relief, the court would act according to its known rules of doing equal justice to all creditors, without any distinction as to priority. And the real estates were ordered to be sold, and that, after paying off the mortgages, the creditors should be paid what was left *pari passu*.

An equity of redemption has never been ^{2 Atk. 292.} held to be liable to a bond creditor in the life of the mortgagor.

In the case of *Penville v. Luscomb*, at the Rolls, the 4th of February 1728, Sir *Joseph Jekyl* was strongly inclined to think there could be no *possessio fratris* of an equity of redemption. ^{Cited, 1 Atk. 604. Cont. ibid.}

demption. *Sed quære*; for in arguing the same case, Mr. *Fazakerley* said he had a note of a case with the same names, determined by Lord *Cowper* in 1716, wherein his Lordship held directly the contrary; namely, that there might be a *possessio fratris* of an equity of redemption. And the latter opinion seems to me to be the most reasonable; for there may be a *possessio fratris* of an use, and yet, in law, an use was neither affets in the executor nor in the heir, as an equity of redemption is; besides, the mortgagee, before foreclosure, is, as to the inheritance, a trustee for the mortgagor, and a trust-estate, now, is analogous to an use at common law.

Co. Litt.
14. b.
1 Co. 124. b.
Plow. 58.

1 Atk. 606.

Bickleys v.
Dorrington.
Monk v.
Pomfret.
Quæ. where?
2 E. Ca. 605.
39 Barnard.
Rep. 30.
Lomax v.
Bird
1 Vern. 182.

In general, no person will be allowed to come into equity for a redemption, but he that is entitled to the legal estate.

Thus, where the plaintiff, claiming under the heir general, came to redeem a mortgage, and the defendant, by answer, set forth a deed of entail, entitling another person to the equity of redemption; the plaintiff prayed he might redeem at his peril, but the Lord Keeper would not permit him to do it, unless he could make out that the estate-tail was docked.

But

But if third persons be interested in the equity of redemption, and he or they who are at law entitled to the estate, refuse to redeem, or act collusively, any person interested will be permitted to redeem.

Thus, where one mortgaged his leasehold estate, and afterwards became a bankrupt, a commission issued, and a meeting was had by the creditors to consider whether the assignees should bring a bill to redeem. The majority of the creditors were of opinion, that it was not advisable so to do. In consequence of this opinion the assignees could not do it, by an express clause in the statute of the 5th Geo. 2, relating to bankrupts. The rest of the creditors thought it was advisable to file a bill for redemption, and thereupon brought a bill in their own names against the mortgagee and the assignees, praying to be let in to the redemption of the lease. The assignees, by their answer, took part with the plaintiffs. One question was, whether the creditors of a bankrupt had a right, in this case, to bring their bill against the mortgagee to compel him to redeem, making the assignees of the bankrupt defendants? Mr. Justice *Parker*, who sat for the Chancellor, was of opinion they had. He said

Franklyn v.
Fern,
Barnard.
Rep. 30.

it was very true that, in general, no person should come into equity to redeem, but who was entitled to the legal estate of the mortgagor. So, if an executor were willing to get in the debts of the testator, there was no foundation for a creditor to bring his bill for that purpose. That in general, where there were proper persons to get in the estate of another, a court of equity would not suffer either the creditors of the testator or the creditors of a bankrupt to bring a bill in equity in order to get in that estate. But that, if an executor or assignees under a commission colluded with a debtor, there was no doubt but a creditor might bring his bill in order to take care of the estate, and charge the assignees or executors with such collusion. That, in this case, there was a meeting of the creditors of the bankrupt to consider, whether it was proper that the assignees should bring a bill in order to be let in to a redemption of his estate; and the majority of the creditors were of opinion that it was not. That the assignees thereupon could not bring this bill, that was, for the benefit of the bankrupt's estate. That any creditor therefore had a right to bring such bill under peril of costs.

And

And a court of equity will assist all persons claiming an equity of redemption, unless their title is directly against conscience.

Therefore, where *A* married a young heiress, and by indirect means procured her to levy a fine of her inheritance when she was *under age*, and *A*'s father was one of the commissioners who took the fine, and the uses of the fine were declared to be to her and her husband, and the heirs of their two bodies, remainder to the heirs of the survivor. The wife died in her minority without issue, and her husband survived her, and made a mortgage of the estate, and died without issue, and the estate descended to his heirs: But the heir at law to the heiress, who had levied the fine, had purchased in the mortgage, and got into possession and levied a fine, and five years passed, and the deed declaring the uses of the first fine was lost. Then the heir of *A*, who was entitled under the first fine and deed, filed a bill to have a discovery of the deed, and a redemption of the mortgage. The heir at law of the heiress pleaded the ill practices in obtaining the fine, and also his own fine and non-claim, and that there was no such deed as that of which the discovery was sought, or if there was, it was obtained by fraud. And

Packington v.
Barrow,
Pre Chan. 215.

Quære as to
the validity of
this fine, if
levied, while
in possession
under the
mortgage.

one

one ground of argument used against the heir of *A* was, that the Court of Chancery would not assist *A*'s heir, who claimed under a fine so ill obtained, and the rather for that such heir was a volunteer without any agreement, previous to the marriage of the heiress, to settle her estate. *Et per curiam*, the defendant insists there was no such deed, or if there was, it was obtained by practice, and also on a fine and non-claim, and also that *A*'s father could not have been assisted here, and the plaintiffs claim under him. *All titles at law that are not directly against conscience, shall be assisted here to a redemption*, and if there were only a blemish in the title, so should the heir of *A*; but the fine and non-claim cannot be got over. The plea is good; dismiss the bill.

2 Vent. 350.

But, although the power of redemption be an ancient right, which the mortgagor and all claiming under him, whether by voluntary conveyance or otherwise, are entitled unto, yet, being a right originating in, and, in fact, created by, a court of equity, it is made subservient to their rules.

And it is said to be a maxim, that none can come to redeem a mortgage, when the mortgagee

mortgagee cannot compel the payment of the mortgage money ; for the remedy ought to be reciprocal. Thus one ground upon which the court doubted whether it should decree a redemption in the case of *Copleston* and *Boxvile* before-mentioned, was because *W R* had no remedy to recover his money. Supra,
Comyns, 609,

And the mortgagor, or those claiming through him, on application to the court, will have redemption decreed to them absolutely, or under certain conditions, according to the nature and justice of their case.

The court, in the exercise of this jurisdiction, views mortgages after forfeiture in two different lights, according to the interest of the party from whom the application comes. If the mortgagor seeks for redemption, he must do equity to the mortgagee, or the court will consider the estate as absolute in the mortgagee. On the other hand, if the mortgagee files his bill to foreclose, the court will enter into the essential nature of the contract, and, considering the transaction merely as a loan, oblige him to submit to be redeemed on the condition originally stipulated ; the payment of the principal advanced with legal interest,

A steady

A steady attention to this mode of construction will explain the principles of all the cases on this head.

Smith v.
Valence,
1 Rep. in
Cha. 170.
Cowper's
Rep. 601.

Thus, where the defendant, being a mortgagee of the premises, afterwards purchased the same *for valuable consideration*; and the plaintiff, having the title of redemption, would, *before* he redeemed, have had the validity of the mortgage *tried at law*; the court, on reading precedents on the plaintiff's part, was of opinion, that the defendant being a purchaser for a valuable consideration, the plaintiff ought to declare whether he would redeem the mortgaged premises or not, before he endeavoured to avoid the title; it being against the rule of justice for the plaintiff to have the equity of redemption from the defendant after he had endeavoured so to do; and that, if he would redeem, he ought to pay the defendant all his principal money due thereon with damages and costs; which he refusing to do, the court dismissed the bill.

Ramsden v.
Langley,
2 Vern. 536.

And, where the mortgagor, being an infant, by his guardian had endeavoured to defeat the mortgagee and overthrow his title, and the mortgagee prevailed, the latter,

latter, on application to redeem, having sworn he had paid a considerable sum more than his costs as taxed, was, on the account, allowed all he had expended; and the mortgagee having (under an apprehension that his mortgage would have been defeated at law) got administration in the Spiritual Court as principal creditor, was allowed the costs expended there also.

So, although the mortgagee cannot compel the mortgagor to redeem before the time agreed upon, *videlicet*, the day appointed for repayment of the money; yet, if a hard bargain be made against the mortgagor, he will be admitted to redeem before that time. Thus where the plaintiff, being seised in possession of lands worth 15 *l. per annum*, and of other lands in reversion subject to incumbrances, in 1657, in consideration of 320 *l.* demised those lands by deed and fine to the defendant for 99 years at 5 *l. per annum* rent, upon condition, that if the plaintiff, or his heirs, should pay the defendant 380 *l.* in 1688, then the conusees of the fine should stand seised to the use of the plaintiff and his heirs; and the plaintiff covenanted for the defendant's enjoyment accordingly. Within
a few

Bonham v.
Newcomb,
1 Vern. 232.

Talbot v.
Braddill,
1 Vern. 183.
Ibid. 394.

a few years after this conveyance made, two old lives, on which the reversionary interest depended, happening to drop, the estate became 45*l.* *per annum*; and, in 1682, the plaintiff brought his bill to be admitted to redeem the premises, and to have an account of profits from the date of the deed, alledging that, though the deed was in that form, yet it was agreed between him and the defendant that it should be a mortgage, and redeemable at any time upon payment of 320*l.* and interest. And although there was no proof of any other agreement than the deed, and there was a bond to perform the covenants of the deed; and it appeared that the estate consisted chiefly in old buildings and a mill, and that the defendant had laid out above 100*l.* in repairs; yet, in regard the plaintiff's mother died within three years after the deed, whereby the revenue exceeded the interest of the money, the Lord Keeper, notwithstanding there was a contingency at the time of the deed, thought this an unreasonable bargain, and decreed an account of the profits *ab origine*, with redemption on payment of what the profits fell short of the 320*l.* and interest; and his Lordship appointed the same to be paid at a day certain,

not

not to expect till 1688, according to the condition of the deed.

The Court of Chancery will not allow a purchaser to oblige a mortgagee in possession to quit the estate to him, unless he will first pay him principal, interest, and costs.

Davy v.
Barker,
2 Atk. 2.

If possession be obtained against a mortgagee by *fraud*, pending a suit, it must be restored before there can be any redemption.

Lant v.
Crisp,
Vin. Abr.
Tit. Mort.
(T). Ca. 16.
p. 467.
2 Eq. Ca. Abr.
599. Pl. 20.

Where the mortgagee first lent money to the mortgagor upon a particular tenement, and afterwards advanced him a farther sum on another estate; and the latter turned out more valuable than the money due, but the first mortgage was sufficient in point of value, the court would not suffer the one estate to be redeemed without the other.

Pope v.
Onflow,
2 Vern. 286.
Margrave v.
Le Hook,
ibid. 207.
1 Vern. 29,
245. *contra*
doubted ex
parte.
String 1 Atk. |
300.

So, if a man makes two several mortgages of distinct lands and then dies, and his heir *endeavours* to defeat the mortgagee of one of the estates, by setting up an entail, and afterwards applies to redeem; he shall redeem both or neither.

Margrave v.
Le Hook,
2 Vern. 207.
1 Eq. Ca.
Abr. 325. 7.
1 Vern. 245.
Max. Eq. 65,
66.

Bromley v.
Hamond,
2 Ch. Ca. 23.

But this rule holds not when the heir claims by purchase, and not by descent. Thus, where *A* and *B*, tenants for life, remainder to their son in tail, mortgaged the lands so settled, *A* died, and afterwards the mortgagee, finding his security bad, gave a third person a premium to procure the son, *tenant in tail*, to borrow a farther sum on mortgage, and then took an assignment from the last mortgagee; the first mortgagee, on application to redeem, insisted, that having now gained a good title at law to the lands, tenant in tail should redeem both mortgages or neither: but the court held the son to be a stranger to the father as to the estate-tail, and decreed a redemption on payment of the last sum borrowed, with costs.

2 Atk. 446.

But if a person, who has two real estates, mortgages both to one person, and afterwards only one estate to a second mortgagee, who had no notice of the first, a court of equity, in order to relieve the second mortgagee, will direct the first to take his satisfaction out of that estate only, which is not in mortgage to the second mortgagee, if that is sufficient to satisfy the first mortgage, in order to make room for the second mortgagee, even though the estates descend to

two different persons; and this is done upon a constant equity, that if a creditor has two funds, he shall take his satisfaction out of that fund, upon which another creditor has no *lien*.

A mortgage being assignable, a purchaser shall hold it against *the mortgagor or his heirs* for the sum due on the mortgage, although he bought it for less than was due, or for less than it was worth; for he stands in the place of the mortgagee who assigned, and who might have given it to him *gratis*. And what was due will be the measure of allowance, not what was given, for that might be more than it was worth as well as less; and he that runs the hazard if a loss happens, ought to have the benefit in case it turns to advantage.

Williams v.
Springfield,
1 Vern. 476.
1 Salk. 155. 4.

Thus, where *A* mortgaged his lands to *B*, and *C*, a stranger, bought the interest for less than was due on the mortgage, and the heir of the mortgagor brought his bill to redeem, the question was, whether *C* should be allowed more than he actually paid? And the Lord Chancellor said that this case had neither point nor edge, for there was no colour why, when the heir came to redeem, he should not pay the

Philips v.
Vaughan,
1 Vern. 336.
Baker v.
Kellet,
3 Rep. Ch.
23. et Sc.
Nelson, 117.

whole money due on the mortgage: for that, if another man had met with a good bargain, there was no equity for the heir of the mortgagor to deprive him of the benefit of it, and take the advantage thereof himself.

2 Vent. 353.
1 Vern. 49.
476.
1 Eq. Ca.
Abr. 330. 3.
1 Salk. 155.
E. 4.

But where a man dies in debt and under several incumbrances, namely, judgments, statutes, mortgages, &c. and the *heir at law* buys in any of them that are of the first date; if creditors, who have the latter securities, prefer their bill, the incumbrances, bought in, shall not stand in their way for more than the heir really paid for them. For a creditor has equal equity with a purchaser, and the taking away the gain of the latter to supply the loss of the former, is making both equal; and therefore the gain the heir would make, if the whole money due on the incumbrance were allowed him, shall be taken from him to make up the loss of the other incumbrancers upon the estate.

Darcy v.
Hall,
1 Vern. 49,
1 Salk. 155. 4.
2 Atk. 54.

So, if an heir at law, trustee, executor, or agent, compound debts or mortgages, and buy them in for less than is the due upon them, he shall not take the benefit of it himself, but the creditors and legatees shall have the advantage of it; and, for want of them,

them, the benefit shall go to those entitled to the surplus.

And where a mortgagor in fee died, and the mortgagee bought in the mortgagor's wife's dower, it was decreed, that the heir of the mortgagor, on his bringing a bill to redeem, should have the benefit thereof, on this principle, that the mortgagee is but a trustee for the mortgagor after his money paid.

Baldwyn v.
Banister, 3 P.
Will. 251.
note A.

In the case of *Bishop* and *Sharpe*, one as a guardian to an infant, took in an assignment of a mortgage; and the Lord Keeper, it is said, was of opinion, that as to the profits received out of the mortgaged lands, the guardian should be taken to be in possession as mortgagee, and not as guardian. But the reporter puts a *quære*; and the law seems to be otherwise; for where a guardian compounded debts, it was decreed, it should be for the benefit of the infant, and that case turns upon the same principle as that by which the case of *Bishop* and *Sharpe* must be governed.

Bishop v.
Sharpe, 2
Vern, 471.

Powell v.
Glover, 3 P.
Will. 251.
note A.

And the equity seems to be the same if a stranger purchase, as against incumbrancers, creditors, or real purchasers.

Williams v.
Springfield,
1 Vern. 476.

X 2

Thus,

Long v.
Clopton,
1 Vern. 464.

Thus, on a Master's special report, to whom the account in question was referred to be taken, it was determined by the court, that an heir or any other person should not, as against a real purchaser, be allowed more on any incumbrance bought in than what he paid for it, without regard to what was actually due thereon.

Brathwaite v.
Brathwaite,
1 Vern. 335.

If an heir purchases in an incumbrance on an estate charged with portions to younger children, he shall be allowed no more than what he really paid for it.

Darcy v.
Hall,
1 Vern. 49.

But if an heir or trustee buy in incumbrances to protect others to which he is himself entitled, the whole money due shall be allowed on account, although it was purchased for less.

If the mortgagor become indebted to the mortgagee on other account as well as upon mortgage, the former debts, as well as the latter, must be discharged before the mortgagor will be decreed to redeem; for, the condition being broken, the estate of the mortgagee is become absolute at law; and the mortgagor, being obliged to apply to equity to help him, having no remedy at law, will be required to do equity to the party

party against whom he seeks to be relieved in equity.

Thus, where the plaintiff made a mortgage to the defendant, and afterwards the mortgagee advanced and lent more money to the plaintiff on his bond, the mortgagor, *on his bill to redeem*, was not permitted so to do without paying both debts, although there was no special agreement proved that the land should stand as a security for the bond debt.

Baxter v. Manning,
1 Vern. 244.
3 Salk. 84.
p. 7.
2 E. Ca. Abr. 603.
pl. 34.

And if the mortgagor become indebted to the mortgagee upon bond also, and die, and his heir come to redeem, he shall not be admitted to redeem without paying the debt by bond; and the reason is, because the heir, after the redemption, will be in by descent, and, of consequence, the estate affets in his hands to pay bond debts; therefore, to avoid circuitry, the heir must pay both, before he will be permitted to redeem.

Shuttleworth v. Lewick,
1 Vern. 245.
Sc. 2. Ch. Ca. 164.
Coleman v. Wynch,
1 Will. Rep. 775.
1 Vez. 87.
Hearn v. Bunce, 3 Atk. 630.
1 Vez. 87.

Thus, where the defendant's grandfather (whose heir and executor he was) became bound with the plaintiff's father (whose heir he was) in bonds for 4000 l. the plaintiff's father conveyed estates by way of mortgage to the defendant's grandfather to

St. John v. Holford,
1 Ch. Ca. 97.

counter-secure him, and afterwards prevailed upon him to become bound with him for a farther sum of 2000*l.* The plaintiff's bill was to be admitted to redeem upon payment of what the defendant's grandfather had paid or been damnified by the bonds for 4000*l.* and what remained due thereon ; the question was, whether the plaintiff should be admitted to redeem without discharging both debts, there being no agreement proved that the mortgage was to be a security against the latter bonds ? And it was decreed, that if the plaintiff would redeem, he should reimburse and save harmless the defendant against the 2000*l.* as well as the 4000*l.*

Anonymous,
2 Vern. 177.
Prec. Ch.
512.
Gory's case,
3 Salk. 240.

So, if the mortgage be of a lease for years, and afterwards more money be lent on bond, if the executor would redeem, he must pay both ; for the equity of redemption is affixed in his hands.

Blackwell v.
Symes, cited
Ambl. Rep.
686.

And where a woman, being a bond creditor, married a mortgagee and died, and the husband took out administration to his wife, he was allowed, on a bill brought by him to foreclose, to tack the bond to the mortgage, against the heir at law.

So, where *F*, seised in fee, mortgaged to *P* for years, and *P* died, having devised his real and personal estate to his daughter *S*, and made her executrix. *S* afterwards lent *F* 500 *l.* upon bond; the question was, whether *S* could tack the bond debt to the mortgage? which depended upon the question, whether *S* was to be considered as entitled to the bond and mortgage in different rights, the one in her own right, and the other as executrix? And it was held by Sir *Thomas Sewel*, Master of the Rolls, upon the authority of the last mentioned case, that *S* might tack these debts.

Price et al' v.
Faltnedge
Amb. Rep.
685.

But if one be indebted to *A* by mortgage of a term for years, and also indebted to him by bond; if on the death of the mortgagor, the executor assigns over the equity of redemption of the mortgaged term, and the assignee of the executor brings a bill to redeem, *he* shall only pay the mortgage money.

2 P. Will. 777.

Upon the same principle, where, on a bill by the heir of the mortgagor to redeem a mortgage of copyhold lands, upon payment of principal and interest, the defendant insisted to have a judgment, which had been assigned to him, first satisfied before he should

Cannon and
Pack, 2 Eg.
Ca. Abr. 226, 6
6 Vin. Abr.
222, 6.

redeem, Lord *Harcourt*, Chan. said, *Copyhold lands are not liable to an execution upon a judgment; ergo, the judgment shall not be tacked to the mortgage in this case, but the mortgagor shall redeem upon payment of the principal, &c. without satisfying the judgment.*

Prec. Ch.
511. 3, 4 W.
and M. c. 13.
Challis v.
Gasborn,
1 Eq. Ca.
Abr. 325. 9.

And since the statute against fraudulent devises, the devisee of the equity of redemption cannot redeem without payment of the debt upon bond, and upon mortgage; because the statute makes such devise void against creditors, and then the devisee stands in the same place as the heir would have stood if no devise had been made; but, before that statute, such devisee would not have been liable to a bond creditor.

The defendant need not be originally both mortgagee and bond creditor; for, if he lends the money on the bond, and hath the mortgage by assignment, there is the same equity for him against *the mortgagor or his heirs* to have both debts paid.

Halliley v.
Kirtland,
2 Ch. Rep.
361.

Thus, where *A* mortgaged lands to *B* for 60*l.* and was also indebted to *C* 50*l.* on bond, and *B* assigned his mortgage to *C*, the court determined that, as the estate vest-

ed was a *chattel lease* liable to debts, and C had an assignment of it, and the bond debt was just, *A*, the plaintiff, ought not to be let into redemption of the mortgage, but upon payment of both debts; and it was decreed accordingly.

And, I should apprehend, the assignee of the mortgage of a *freehold estate* would be entitled to the same equity.

If the money due on the bond be lent first, and the mortgage made afterwards, yet there is the same equity for the mortgagee to have both sums paid him. Thus, where *A* borrowed of *B* 300 *l.* on bond, and afterwards mortgaged lands to *B* for 2000 *l.* lent, and then died, the plaintiff, the heir of *A*, prayed a redemption; and the defendant insisted that the 300 *l.* was agreed to be secured also by the mortgage: and the plaintiff was decreed to pay the defendant both debts.

Wyndham v.
Jennings,
2 Rep. Ch.
247.

This appears to be one of those instances in which the equity will carry the debt beyond the penalty of the bond, if the principal and interest exceed it; for, in this case, the obligee is the defendant, and the plaintiff applies for redemption; therefore, if the principal

Peers v.
Baldwin,
2 Eq. Ca.
Abr. 611.
pl. 4.
3 Atk. 518.

principal and interest exceed the penalty, the plaintiff, in equity, ought to pay it, for he comes for equity, and it is a maxim that *he that seeks equity must do it.*

Barrett v.
Wells,
Prec. Ch.
331.

But, if the mortgagee or assignee, to whom money is due on bond, countenance a fraud upon a third person, by concealment thereof, he shall be redeemed upon payment of the principal money only : Therefore, where the plaintiff, devisee of an estate, subject to a mortgage term for 1000 years, let the interest run in arrear, and gave several bonds for securing it, and then died ; his son and heir being about to marry, the intended wife's father applied to the mortgagee to enquire what was due on the mortgage, who, being desired not to discover the bonds, said, that there was only 500*l.* due, and that all interest was paid ; and that, upon payment of the 500*l.* he would deliver up the mortgage. The court held, on application to redeem, that the mortgagee, by concealing the bonds, had discharged the lands from being liable to more than what was then pretended to be upon them, and decreed a redemption, upon payment of the 500*l.* with interest from that time, and without costs.

And

And if part of an original mortgage be paid off, and then a farther sum be borrowed by the same parties on a defective title, the last sum must be paid off on redemption as well as the first.

Reason v.
Sacheverell,
infra.

But, though the mortgagee, when defendant, shall have this equity against *the mortgagor*; yet, if the latter mortgage his equity of redemption *to another*, the second mortgagee shall not be affected thereby; for the bond is but a personal charge upon the mortgagor.

3 Salk. 84. 7.

So, in respect of the heir, if there be several *incumbrances* upon an estate, and the prior incumbrancer claims a bond likewise, it will be postponed to all real incumbrances, whether by mortgage, judgment, or statute; for the bond is no charge on the estate, and he hath not the same equity against a puisne incumbrancer, as against an heir at law, who is liable to the bond in respect of assets.

Morret v.
V. Haske,
2 Atk. 52.
Gory's Case,
3 Salk. 240.
Troughton v.
Troughton, 1
Vez. 87,
Powis v.
Corbett, 3
Atk. 556.
3 Salk. 84. 7.

Upon the same principle, if the person, claiming the equity of redemption, is a purchaser for a valuable consideration, the mortgage may be redeemed by him without discharging the bond; because the lands, in the hands of the alienee, can be charged with

Bayly v.
Robison, Prec.
Ch. 89. Archer
v. Snatt, 2
Strange, 1107.
Wood v.
Mortimer,
cited in the last
case, 1 Eq.
Ca. Abr. 325.
10. 1 Vez. 87.

Coleman v.
Wynce, Prec.
Ch. 511.
Vid. Trough-
ton v.
Troughton,
1 Vez. 87.
Anon. 2 Vez.
662.

with nothing but what is an immediate lien thereon, which the bond is not.

Nor shall a bond be discharged on redemption of a prior mortgage, against creditors under a deed of trust of the equity of redemption; for it is only a charge upon the assets.

Hearn v.
Bance, 3 Atk.
630.

Therefore, where the question was, whether a mortgagee, who had lent a farther sum afterwards upon a bond, should be allowed to tack it to his mortgage, in preference to the other creditors of the mortgagor under a trust for payment of debts created by the will of the mortgagor, it was decided that the mortgagee should not tack the bond to the mortgage; for there being a devise for the payment of debts, the descent was consequently broke; therefore the mortgagee could have no priority with regard to his bond, but, as to that, must come in, *pro rata*, with the rest of the creditors under the trust.

Lowthian v.
Hafel,
3 Brow. Rep.
Chan. 162.

And a mortgagee cannot tack a bond to his mortgage, even against other specialty creditors. This point was so determined on reference to the principle upon which the rule, in respect of tacking a bond debt to a mortgage, is founded, and which furnishes

an

an obvious solution of all the cases which we have stated as exceptions to the rule. For the only reason why the mortgagee can tack his bond to his mortgage, is to prevent a circuitry of suits; it is solely matter of arrangement for that purpose; for the right has no foundation in natural justice. A creditor's having another specific security, cannot give him in justice any priority. It is not done in any case but that of the heir, and merely to prevent circuitry.

A purchased of *B* the lands in question, and re-mortgaged them for securing part of the purchase money, and for other part thereof gave a note payable on demand, on which 200*l.* remained unsatisfied, and *A* devised his lands to be sold for payment of his debts, and died, not leaving sufficient assets; the question was, whether this 200*l.* remaining due on the note, being for part of the consideration money, should have a preference to other debts, and be looked on in equity as a charge upon the land, and the rather, for that *B*, as mortgagee, had the real estate in him. And it was held that *B* could have no preference, but must accept satisfaction in proportion only with the other creditors.

Bond *v.*
Kent, 2 Vern.
281.

Mortgages

Mortgages are held not to be within the words of the statute of limitations; and no positive time hath as yet been fixed upon, which shall be an absolute bar to redemption, because courts of equity have considered that a mortgagee cannot be injured if he receives his principal, interest, and costs; though a mortgagor may, if he be obliged to part with his estate for less than its value. But the making up of accounts, after long periods of time, being very difficult, and attended with great hardship on the mortgagee, it hath been thought reasonable to establish on an equity, in analogy to this statute, a period, at which, *prima facie*, the right of redemption shall be presumed to be deserted by the mortgagor, unless he be capable of producing circumstances to account for his neglect, such as by imprisonment, infancy, coverture, or by having been beyond sea, and not by having absconded, which is an avoiding or retarding of justice. And, to preserve an uniformity between the proceedings in courts of law and equity, twenty years after forfeiture and possession taken by the mortgagee, no interest having been paid in the mean time, hath been fixed upon as the period, beyond which a right of redemption shall not be favoured.

Knowles v.
Spence,
1 Eq. Ca.
Abr. 315. 5.
Orde v.
Smith, Sel.
Ca. Ch. 9, 10.
Ibid. 56.
Jenner v.
Tracey, note.
3 Will. 288.
Belch v.
Harvey,
ibid.
Saunders v.
Hord, 1 Rep.
Ch. 184.
Clapham v.
Bowyer, ibid.
206, et 3 Atk.
313.

And

And a defendant, in a bill for redemption, may avail himself of this equity by pleading the statute of limitations. This point was so settled by Lord *Hardwicke*, after an investigation of the authorities on the subject in the case of *Aggas and Pickerell*, and the plea allowed.

Aggas v. Pickerell, 3 Ath. 225.

And as the courts do, *prima facie*, consider the redemption as barred after twenty years, where there is no disability in the mortgagor, in imitation of the first clause of the statute of limitations; so, after the disability is removed, the time fixed for prosecuting in the proviso, which is ten years, ought likewise, it seems, to be observed.

Per Lord Talbot. in *Belch v. Hervey*, note, 3 Will. 288. *Quære, et vid. infra.* *Rakestraw v. Brewer.*

Thus, at a rehearing before the Lord Keeper, assisted by two justices, concerning the redemption of a mortgage that had been made above forty years, the court declared, the mortgagors should not be relieved after twenty years, for, though these matters in equity were to be governed by the course of the court, yet, as in the statute of the 21 *James*, cap. 16, the legislature had adjudged it reasonable to limit the time of entry to that period, unless there were such particular circumstances as might vary the ordinary case, which were therein provided

White v. Ewer, 2 Vent, 340. 1 Ch. Ca. 102.

for, it was best to square the rules of equity as near the rules of reason and law as might be.

Isham v. Cole,
1 Rep. Ch. 128.

And the court refused to redeem after thirty-three years, although it was proved by one witness that, about *twenty-four years* before the then application to redeem, the mortgagee had told him he was fully satisfied, and paid all his demands upon the mortgagor.

But the reporter says, that the court proposed, in respect of the badges of equity in this cause in favour of the plaintiff, to do something for the plaintiff which the defendant consented to.

Chapman v.
Boyer, 1 Rep.
Ch. 207.
Nelson 34.

In the case of *Chapman v. Boyer*, "That the mortgage had not been redeemed after twenty years forfeiture, and that the estate had descended to an heir who had sold the same," was, on pleading, held good.

Ca. temp.
Talbot, 63.
et vid. *Baker*
v. Wind, 1
Vez. 160.

But, if there be fraud in the transaction, as if a mortgage be made by an absolute deed without a defeazance, no length of time will be a bar.

Thus

Thus, where *A*, for a small sum of money, mortgaged lands to *B*, and, to deceive the mortgagor, it was expressed that the redemption should be made with *A*'s own money and in his life-time; *A*'s necessities drove him abroad, where he died; *B* afterwards devised the money, *if the mortgage should be redeemed*. On a bill exhibited to redeem, length of time was objected, 41 years having elapsed; but the court decreed a redemption, saying, that there was fraud in the original agreement, for the words, *to be paid with his own money*, were thrown in to make *A* imagine it could not be done otherwise.

Order v. Smith,
Select Ca. in
Ch. 9, 10.

So, also, if there be any legal impediment affecting the person having a right to redeem, he may redeem after such impediment is removed, although the period limited by the court be past. For this being an equity founded upon the statute, no greater allowance is made in consideration of length of time, than the statute of limitation gives in cases coming within its letter. Thus, where husband and wife mortgaged copyhold lands (of which she was seised to her and her heirs, according to the custom of the manor) by surrender to the mortgagee, which, by non-payment, became forfeited; the mort-

Comel v.
Sykes, 1 Rep.
Ch. 194.

gagee took possession, and disposed of them to his wife for life, with a reversion to the defendant and his heirs; afterwards the wife, the mortgagor, died, not having been able to redeem during her coverture. The lands were conveyed over. Then the plaintiff, her son and heir, applied to the mortgagee to redeem, and it was insisted that he ought not to redeem against the alienee of the premises, twenty-five years being elapsed; but the court resolved, that, in regard of the impediment in the plaintiff's mother, which prevented her redeeming during her coverture, the plaintiff ought to redeem, and decreed accordingly.

3 Atk. 225.

And the plaintiff, in a bill to redeem, may take advantage of such legal impediment on plea of the statute of limitation by way of reply, or by amending his bill. And for this reason Lord *Hardwicke* was of opinion, in the case of *Aggas and Pickerell*, that if a bill was brought to redeem, and the plaintiff set forth that he had been long out of possession, and did not shew himself to be within any of the exceptions of the statute, you could not take advantage of that by demurrer; for the plaintiff might make it appear by way of reply, or by amending his bill, that he was within the savings of the statute, or, upon a plea,

plea, he might prove himself to be within the exceptions. But if it was to be allowed by way of demurrer, the bill would be out of court.

But, if the twenty years, considered in equity as a presumptive bar, begin to run, the intervention of a legal disability in the person having a right to redeem, will not prevent the time going on against him.

Thus, where the plaintiff's father, in 1697, mortgaged the lands in question to the defendant, and in 1698, the mortgage being forfeited, the defendant brought his ejectment and recovered possession; and on a bill to redeem or foreclose, had a decree accordingly, which was assigned and enrolled in 1701. In 1702, the plaintiff's father died. The plaintiff continued an infant till 1709, when he came of age. In 1721, he brought a bill to set aside this decree, and be let into a redemption, on payment of principal, interest, and costs, suggesting therein that the defendant was much overpaid; that the lands were of greater value; that the proceedings in the decree were *ex parte*; and that there were many irregularities therein. The defendant answered to part, and pleaded the decree of foreclosure and enrolment; insist-

Floyd v. Mansell, Gilbert's Rep. Eq. 185.
St. John v. Turner,
2 Vern. 418.
Knowles v. Spence, 1 Eq. Ca. Abr. 315.
p. 5.

ing, that it would be against practice to set aside a decree, signed and enrolled, by an original bill: and the Lord Chancellor dismissed the bill, but without costs, saying, that, in this case, the infancy of the plaintiff would not help him, the right to redeem not beginning in his time, but in his ancestor's; for, in all such cases, the party was barred, and had not twenty years after the impediment was removed.

2 Atk. 333.

And so it is, although there be coverture or a tenancy by courtesy, yet, if the time begin to run, the disability will not protect the equity of redemption.

But, where there has been an account made up on a bill to foreclose within twenty years, though the mortgage be fifty years old, yet the heir of the mortgagor will not be barred; and the reason is, that the difficulty of accounting (which is one principal ground upon which the court found their objection to redemption after a great length of time) being removed, no injury will accrue to the mortgagee in being obliged to receive back his principal, interest, and costs. And therefore, where the bill was to redeem a mortgage made in 1642, it appeared the mortgagee entered in 1650, and there

Procter v.
Cowper, 2
Vern. 377.
Trin. T.
1700.

there were three descents on the defendant's part, and four on the part of the plaintiff; but, the length of time being answered for the greatest part by infancy or coverture, and an account having been made up by the mortgagee on a bill brought by him in 1686, to foreclose, the court decreed a redemption and an account from the foot of the account in 1686.

And an account settled between the mortgagor and mortgagee within the time limited, although there be no bill filed, will preserve the mortgagor's right of redemption.

Thus, where a mortgage was made in 1713, and the clerk to the solicitor for the mortgagor, in order to pay off the mortgage, settled an account, in 1730, of what was due for principal and interest, and no farther proceedings were had; yet that was held by Lord *Hardwicke*, on application in 1742, to save the right of redemption. Anno. 2 Atk 333.

But, although there be a decree to redeem, and an account, yet, if it be suffered to lie dormant, and be not prosecuted within the time limited, the mortgagor and his heirs will be barred.

Y 3

Thus,

St. John v.
Turner,
2 Vern. 418.

Thus, where *A*, in 1639, demised the lands in question to *B* to counter-secure him against debts, for which *B* stood bound as security to the amount of 4000*l*. In 1649, *B* entered on his security, and, by will, devised certain sums out of it to his daughters, and the rest to his sons. In 1662, the executors allotted the lands among the children of *B* according to their respective proportions. In 1663, a bill was brought by the heir of *A* to redeem, and thereupon a decree was made to account. The heir died. Afterwards the suit was revived by *A*'s daughters, who were co-heiresses, and in 1672, an account was again decreed. The plaintiff being of the same name as *A*, purchased the equity of redemption of the lands in question from the co-heiresses, and in 1700, brought his bill to redeem, and to have the benefit of the former decrees. But the Lord Keeper dismissed the bill, and would not allow the plaintiff to redeem, by reason of the difficulty of accounting after so great length of time; especially, as the mortgagor had himself acquiesced from 1639 to 1663, and neither paid the debt nor sought a redemption; for, though a decree had been obtained, it was not prosecuted.

But

But there is a species of contract which partakes of the nature of a mortgage in as much as there is a debt due, and an estate as a security for the repayment, but differs from it, in the circumstances that the rents and profits are to be received without account till the principal money is paid off, and that there is no remedy to enforce the payment. This is called a Welch Mortgage, and implies a perpetual power of redemption subsisting for ever, and the mortgagee cannot compel a redemption or a foreclosure.

Thus, where there was a proviso in the deed, that if the mortgagor, or his heirs, or assigns, should, on a *Michaelmas* day named in the deed, or any *Michaelmas* day following, pay to the mortgagee, his heirs, or assigns, the mortgage money and all arrears of interest which should be then due, then the conveyance was to be void; it was held to be in the nature of a conditional purchase, subject to be defeated on the payment of the sums stipulated at any *Michaelmas* day at the election of the mortgagor or his heirs; and that there was an everlasting subsisting right of redemption, descendible to the heirs of the mortgagor, which could not be forfeited at law like other mortgages; and that, therefore, there could be no equity of

Howel v.
Price, Prec.
Ch. 423.
Sc. 1 Will.
291.
2 Vern. 708.

redemption, or any occasion for the assistance of the court, but the mortgagor might, even at law, defeat the conveyance by complying with the terms and conditions of it, which were not limited to any particular time, but might be performed at any *Michaelmas* day to the end of the world.

Orde v.
Herning
2 Vern. 701.

So where there was an agreement that the mortgagee should hold the premises until he was satisfied, time was held to be no bar to the redemption; *not* even though it appeared by the plaintiff's own shewing that sixty years were elapsed.

Yates v. Hambly,
2 Atk. 360.

So where *A*, in 1699, having borrowed 50 *l.* of *B*, conveyed several houses to the use of *B* and his heirs, until he should have received by the rents and profits thereof the 50 *l.* with interest, and all other sums by him advanced to the mortgagor; and after payment by such rent of the 50 *l.* and all such sums as should be advanced then to the use of *A* for life, with remainder over, and no application was made to redeem until 1740; it was held, on a question, whether this mortgage might be then redeemed, that the estate was then a redeemable interest, and that no bar arose from length of time. For it was said, that this differed from a common mort-

mortgage, this being a conveyance of the inheritance, for securing the money lent, or any other sum advanced by the mortgagee, in trust that the mortgagee should continue in possession till, by perceptions of the rents and profits, he should be satisfied, the principal and interest upon such sums as he had already lent, or should lend, and subject thereto in trust for the mortgagor, &c. Now there never could be a forfeiture under this deed, because the mortgagee was only in the nature of a tenant by *elegit*; and as soon as his principal and interest was satisfied by being paid off, or by perception of rents and profits, the estate ceased in *B*, and *A*, or those claiming through him, might have brought an ejectment; nor would any bar have arisen from length of time, unless the statute of limitation had run by the mortgagee's continuing in possession twenty years after the money had been paid off. And the mortgagor in such case may also come into a court of equity for an account of the profits received, as on an *elegit*, and to have the surplus, if any, after discharging the mortgage, paid over to him; and in such cases there is nothing for the statute of limitations or the rule adopted in equity by analogy to operate upon, for there is no forfeiture.

But

But it was observed, in the preceding case, that if after the account should be taken in chancery, it should appear that the mortgage was satisfied by perceptions of profits twenty years before, and that the mortgagee had continued in possession from that time, the statute of limitations would run,

Hartpole v.
Walsh,
4 Brown's
Parl. Ca. 369.

But, in the case of *Hartpole v. Walsh*, where *H*, in consideration of 600 *l.* lent him by *W*, conveyed estates to him in fee subject to a proviso, That "the conveyance should be void, whenever *H*, his heirs, executors, administrators, or assigns, should, on any last day of *June* or *December*, pay unto *W*, or his heirs, the sum of 600 *l.*;" and it was agreed by the indenture, that *W* and his heirs should receive the yearly rent of the premises in lieu of his interest, with a view to which, possession was delivered to him; and afterwards *H*, in consideration of 2300 *l.* paid by *W*, granted and conveyed the premises comprised in the former mortgage, together with others, to him, his heirs, and assigns, and covenanted that, whenever *W* should give to him, his heirs, or assigns, eighteen months notice by letter in writing, requiring payment for the 2300 *l.* *H*, his heirs or assigns, should pay the same with interest within eighteen months after such request; and

and *W* was in like manner let into possession of the last-mentioned premises; a bill for redemption brought, after a period of one hundred years were elapsed, was dismissed, and that decree for dismissal affirmed in the House of Lords,

The ground of which decree, as to the premises first mortgaged, appears to have been, that the comprising them in the latter mortgage put it in the power of the mortgagee, or his representatives, to ascertain and limit the time of redemption by demanding the mortgage money, which demand was admitted to have been made by *W*,

Any act of the mortgagee, by which he acknowledges the transaction to be a mortgage within twenty years, will take the case out of this rule; as, by devising the money in case the mortgage should be redeemed, or exhibiting a bill to foreclose.

Orde v.
Smith,
Sel. Ca. Ch.9.
supra.

So a man, taking notice by a will, or any other deliberate act, that he is a mortgagee, will take the case out of the rule that a mortgagor shall not redeem after forty years.

But

But a mere conversation, by which a person, once a mortgagee, but to whom a subsequent conveyance was made, importing a title, might otherwise have been inferred to have admitted he held by mortgage, was, on an appeal from a decree of the Master of Rolls, deemed by the Chancellor not to be a case within the exception.

Perry v.
Marston,
2 Bro. Rep.
Chan. 397.

On the appeal to which I have last alluded, the facts appeared to be, that a surrender was made by *P* to *M*, the reconveyance to be to such uses as *P* should direct, or to himself in fee. There was a subsequent surrender to the use of himself for life, remainder to his wife for life, remainder to *M* in fee, subject to the trusts of the former conveyance. Under these conveyances *P* enjoyed the estate without paying interest until the year 1751, when he died, and after his death his wife enjoyed in like manner during her life. In the year 1751, upon the decease of the husband, part of the premises were sold, and the wife joined in the conveyance. She dying soon after, *M* took possession, and held the same without any account to 1765, and from thence to 1779 no act was before the court to show under what title *M* held. In 1776 a bill was filed to redeem. In the first answer put in 1780, *M* denied that he held

held as a mortgagee, and claimed to hold by title under the second deed. In the same year the conversation passed, which was considered as a declaration, that *M* held only as a mortgagee. It was a conversation between the son of *P* and *M*, in which *M* asked the son, *why his father did not pay the money; to which he answered, because he was so poor that he could not pay it. The reply of M to this was, he was ready to settle the matter without suit.* An amended bill was afterwards filed, and the cause was heard at the Rolls, and on the above evidence being read, a redemption was decreed. But, upon appeal to the Chancellor, the decree was reversed, on the ground that the second conveyance must have been in consequence of a new agreement, not a mode of keeping up the mortgage; as otherwise the mortgagee would have got the equity of redemption for nothing, and the *P*'s would have estates for life, subject to the mortgage money, which was more than they were worth: the words, "subject to the trusts," must therefore mean, "subject to the life estates of the mortgagor and his wife. Then if it was considered as matter of title, the rule did not apply. If *M* had been the surrenderor (which he ought to have been) it could not have been, that a conversation should defeat a clear act. Then

there

there was evidence of a clear possession in P and his wife. After her death the M's took the estate, and treated it as their own. On the whole the Chancellor was of opinion, that the surrender was an instrument of title; and the decree was reversed.

White v.
Pigeon,
Tothill, 232.

So, where a bill was demurred to, because it was to be relieved against a mortgage after forty-one years, yet, on a promise being proved that the mortgagor should be at liberty to redeem after twenty-seven years, the demurrer was disallowed; because, though forty-one years had passed since the mortgage, yet but fourteen had elapsed after the time agreed for redemption.

Conway v.
Shrimpton,
1 Brown's
Parl. Ca. 309.
Vin. vol. 5.
p. 505. Ca. 5.
2 Eq. Ca.
Abr. 596.
Ca. 10. 738.
Ca. 2.

So, a mortgage was decreed to be redeemed upon the foot of an account stated previous to the mortgagee's entering upon the premises, notwithstanding he had been in possession forty years; the husband of the heir of the mortgagee having entered into an agreement with the heir of the mortgagor, about seven years before the bill for redemption came to a hearing, for the purchase of the equity of redemption. For although, for reasons sufficiently evident in the case, the court refused to decree a specific performance of that agreement, yet it seems

to

to have been considered, as an admission by the mortgagee, that, at that time, he conceived the mortgagor had a right to redeem, which, occurring within seven years of the time of exhibiting the bill, brought this case within the reasoning of that immediately preceding.

Upon the same principle, a redemption was decreed upon a bill filed fifty-five years, after the original mortgage, and forty-seven years after the mortgagee got into possession, after five ejectments brought to defeat his estate by a title paramount, and after refusal by four different answers to come to an account upon the foot of the mortgage, and to redeem. For, the non-redemption for thirty-eight years of the time elapsed, being accounted for, by having been occupied in different suits brought by the contending parties, a period of seventeen years only had run out between the time of settling that dispute, and the exhibiting the bill to redeem.

Palmer *et al'*.
v. Jackson *et al'*. 5 Brown's
Parl. Ca. 194.

And if the mortgagee *submit* to be redeemed, time will be no bar.

Thus, where a bill was brought to redeem after the mortgage had been in possession

Proctor v.
Oates, 2 Atk.
Rep. 140.

from 1707 to 1732, the year in which the bill was filed; and the defendant (it being a family affair) submitted by his answer to be redeemed notwithstanding the length of time; Lord *Hardwicke*, though he said he saw no colour for the redemption, yet, on the defendant's submission, decreed an account of what was due for principal, interest, and costs, and directed the plaintiff to pay the same in six months after the Master's report, or, in default, the bill to be dismissed without costs.

Rakestraw
v. **Brewer**,
Sel. Ca. Ch.
55. Mosely
190.

Time will be no bar if the mortgagor remain in possession. As, where a person had chambers in *Gray's Inn*, and mortgaged them in 1687, but continued the possession till 1700; at which time an order of the bench was made to deliver possession of the mortgaged premises to the mortgagee; upon part of which he entered; but, as to the other part, the mortgagor continued in possession till 1708, when he died, leaving the plaintiff an infant, who came of age in 1714. From the death of the mortgagor, the mortgagee had possession of the whole. A bill was brought to redeem in 1726, and it was so decreed at the Rolls, and the decree was affirmed by Lord Chancellor *King*, who said nothing was more clear than that, if the mortgagor was in possession
of

of any part, he should be admitted to redeem the whole; for, part of the chambers he might redeem as being in possession thereof, and part he could not, separately from the whole; therefore he should redeem the whole. If the mortgagee were in possession for twenty years, and no interest paid, there should be no redemption allowed. In this case the mortgagor was in possession of part, till 1708; from 1708 to 1714, the plaintiff was an infant, so that was accounted for, and from that time it did not amount to 20 years.

But, in this case, the court would not enter into the question, until they were satisfied, the benchers had given the parties leave to try it by law, saying, that this regard was to be had to all the societies at law, that all their disputes might be determined amongst themselves; and the court, having determined the right, ordered, that the benchers should settle what was due for principal, interest, and costs, and take an account of the several receipts and allowances.

On a bill brought to redeem a mortgage of long standing, an objection was made for want of parties; namely, that as there had been an absolute conveyance made of this

*Yates v.
Hambly,
2 Atk. 237.*

estate by the mortgagee without any clause of redemption, with several limitations over, the persons in remainder under this conveyance ought to have been parties. *Et per curiam*: When a mortgagee, who has a plain redeemable interest, makes several conveyances upon *trust*, in order to entangle the affair, and to render it difficult for a mortgagor or his representatives to redeem, then it is not necessary that the plaintiff should trace out all the persons who have an interest in such trusts to make them parties. But where the redemption depends upon equitable circumstances, and the plaintiff is not in the common case of redemptions, and where the mortgagee in fee has made an absolute conveyance with several limitations and remainders over, the decree cannot be complete without bringing at least the first tenant in tail before the court.

But on a bill by a second mortgagee to redeem the first mortgage, the mortgagor or his heir must be brought before the court; because without him complete justice cannot be done between all parties.

Fellw. Brown,
2 Bro. Rep.
Chan. 276.

H, the elder, and *A*, the younger (his second son) by surrender, conveyed the reversion of copyhold estates (after the decease of

of *H* the elder) to *B*, in fee, subject to redemption on the payment of 30*l.* and interest, and *B* was admitted tenant to the land. The estate was afterwards charged with a farther sum lent to *H* the elder, and *H* the younger by *B*. Then *H* the younger, who survived his father, devised the estate to *S H*, subject to the mortgage and died. Afterwards *S H* surrendered the same estate, subject to the first mortgages, to *F* in fee, to secure the repayment of a sum borrowed of *F* by himself. And by a deed bearing even date with the last mentioned surrender, the uses thereof were declared to be in trust to sell the same, and in the first place to pay himself the money by him advanced, with interest, and to pay the surplus to *S H*, his heirs, executors, or administrators. *F* was admitted tenant to the Lord. Then *B*, the first mortgagee, entered into possession of the said copyhold estates. *S H* died, leaving *R H*, of *Baltimore* in the province of *Maryland*, his heir at law. *F* filed a bill against *B*, and *R H*, charging the latter to be abroad in *America*, and praying an account of what was due to *B* for principal and interest, and that *B* might account for the rents and profits, and pay to *F* what should appear to be due to him, after paying such principal and interest, and in case that should

not be sufficient to satisfy *F*'s demand, that the estate might be sold, and proper parties join for that purpose, and *F* be paid out of the purchase money, and the residue paid and applied as the Court should direct. *B* by his answer acknowledged the possession, and said, that he was ready to account to such person as should appear to be entitled to the equity of redemption ; but that he did not know who was so entitled, not knowing what was become of *T H*, whether he was living or dead, or whether he was ever married, or had left any child or children. One question which arose in the cause was, whether there were proper parties before the Court, the supposed heir at law of *T H*, the mortgagor, being in *America*, and his personal representative not being before the Court. On the part of *F*, it was insisted that there were sufficient parties ; that *B* had the real pledge in his hands, and although there might be a contract between the heir and the executor, that did not affect him. Between the first and second mortgagees, it was not necessary to make the mortgagor a party. All the decree was redemption of the first mortgage, and a conveyance to the second, not an account of rents and profits, unless the mortgagee was in possession. That neither the mortgagor, nor the first mortgagee

gagee were hurt by its being unnecessary to make the mortgagor a party to the bill between them; for the first mortgagee was liable to no farther account to the original mortgagor, the second mortgagee being bound only to make him just allowances, and if he should do otherwise, being liable to all charges which might have been made against the first mortgagor in his account, with the original mortgagee. *Sed per Curiam.* It is impossible that a second mortgagee should come into this Court against the first mortgagee, without making the mortgagor or his heir a party. The natural decree is, that the second mortgagee shall redeem the first mortgagee, and that the mortgagor shall redeem him or stand foreclosed. It therefore must be necessary to have the real representative before the Court, though it is not necessary to have his personal representative.

Where a mortgagee assigns without the mortgagor's joining, the heir of the mortgagor, on preferring a bill to redeem, has no occasion to bring the original mortgagee before the Court, for the assignee as standing in his place will be decreed to convey.

Hill v.
Adams, 2
Atk. 39.

There is one case in which the legislature has thought proper to take from the mort-

gagor the equity of redemption, and to give the mortgagee an absolute estate in the land; that is, where the former is guilty of a fraud upon the latter by concealing prior incumbrances. In such cases it is enacted, by the 4 & 5 *W. & M. cap. 16*, that if any person shall borrow any money, &c. or become indebted for any other valuable consideration; and, for the payment thereof, shall voluntarily give a judgment, statute, or recognizance, and shall afterwards borrow any other sum of another, or for other valuable consideration become indebted to such other, and for securing the repayment and discharge thereof shall mortgage lands to the second lender, or to any other person in trust for him, and shall not give notice to the mortgagee of such judgment, &c. in writing, before the execution of the said mortgage or mortgages; such mortgagor shall have no benefit in the equity of redemption of the lands mortgaged, unless such mortgagor or his heirs, upon notice given by the mortgagee in writing under hand and seal, attested by two witnesses, of such former judgment, &c. shall within six months pay off and discharge the same, and cause the same to be vacated and discharged. And if any person, who shall once mortgage lands for valuable consideration,

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On this statute, it hath been determined, that it is incumbent on the mortgagor, previous to a second mortgage of his lands, to give the second mortgagee notice in writing, under his hand, of all prior incumbrances.

Stafford *et al.*
v. Selby, 2
2 Vern. 589.
S. C. 1 E. Ca.
Abr. 320. 5.

That a mortgage, which on the statute becomes irredeemable, although assigned over to another in consideration of what is actually due thereon for principal, interest, and costs, still remains irredeemable in the hands of the assignee, who may take advantage of the statute against clandestine mortgages.

Ibid.

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Ibid.

Ibid.

That, if a *subsequent* mortgagee redeems such foreclosing mortgage, he shall hold the estate irredeemable.

Ibid.

That, if there are *more* lands in the second mortgage than in the first, that is a case omitted in the statute.

Ibid.

That, the adding an acre or two would not exempt the case out of the statute, but would be considered as a contrivance to avoid it.

Stafford *et al.*
v. Selby, 2
Vern. 589.
S. C. 1 E. Ca.
Abr. 320. 5.

That a mortgagee, who claims the benefit of this statute, must have conducted himself fairly throughout the transaction; it being intended to recompence honest mortgagees for the trouble, hazard, and charge they may be put unto, and not to cover a fraud or ill practice in obtaining a mortgage, or an assignment thereof, or in becoming a purchaser.

CAP.

C A P. XI.

Of a Devise of Lands mortgaged.

THE mortgagee may devise lands mortgaged to him, and they shall pass thereby to the devisee; and if the devisee exhibit his bill against the mortgagor for redemption, or to foreclose, a decree will be made accordingly.

How v.
Vigures,
1 Ch. Rep.
33.
Infra 357.

Thus, where G, the father of the defendant, being seised in fee of lands, mortgaged them to K and his heirs, with a proviso for redemption; and afterwards K, by his will in writing, gave all his goods, bills, bonds, mortgages, or specialties, for monies to R K, and made him his executor and died; the court were of opinion, that the words "*all my mortgages*" made a good devise of the lands mortgaged.

Crips v.
Gryfil, Cro.
Car. 37.
Trin. 2 Car. 2.

And

And it seems that the effect would be the same if the devise were of all the testator's, money due on mortgage, the whole interest, both in the thing mortgaged and the money, would pass to the devisee.

Supra, 166.

In the case of the Attorney General and *Meyrick*, before mentioned in this treatise, a distinction was attempted to be made on the ground, that the mortgaged estates were not devised, but only the money due by mortgage, consequently, that the devise was only of the beneficial not of the legal interest, which descended to the heir. But the master of the Rolls rejected this distinction between a devise of mortgaged estates, and of the money due on mortgage, as not well founded; observing, that by a gift of all a man's mortgages to *A*, the whole beneficial right passed to him, and whether the legal interest were in the heir or executor, as it happened to be a mortgage in fee or a term for years, each would be considered as trustee for *A*, who would be permitted by the Court of Chancery to use their names to get the money, or make the pledged estate his own by foreclosure. If it would be so in that case, then equally would it be so, if the phrase used were money due on mortgage, where, unless it were construed to pass the whole

whole interest of the mortgage, it would make it in effect a void devise, or at least put it in the power of a third person, whether the devisee should take thereby or not.

But, a distinction was formerly taken between mortgages in fee, and those for years; for, if the former were forfeited, it was held that such general words did not convey an absolute estate therein, but at most only for the life of the devisee.

Thus, where one seised of divers lands in *A*, *B*, and *C*, in fee, the lands in *C* being in him by mortgage, and forfeited, made his will; and, after devising the lands in *A* and *B* to several persons and their heirs, and several legacies to other persons, gave *all the rest of his goods, chattels, leases, estates, mortgages, debts, ready money, plate, and other goods whereof he was possessed, to his wife, after his debts and legacies paid*, and made her executrix, and died; whereupon she entered into the lands mortgaged, and devised them to *M* and his heirs, and afterwards she died. On an *ejectione firmæ* brought by the heir of the mortgagee against the devisee of the wife, the sole question was, whether the fee in the mortgages passed to the wife by this devise? And the Court were of opinion that

Wilkinson v.
Merryland,
Cro. Car.
447. 449,
450.
Trin. 11. Car.
2. Sc. W.
Jones 380.

no fee passed; for, that the heir should not be disinherited, nor the fee passed away, without an apparent intent arising out of the words of the will. And, in this case, it did not appear that he intended to pass but such things whereof *he was possessed*, which extended only to things personal, or leases, and not to freeholds whereof he was said in law to be seised. And perhaps he was not possessed of this land; for it was not found that the mortgagee entered and was in possession, and commonly the mortgagor retained the possession until forfeiture.

Cro. Car.
450.

In the same case it was said, it would have been very doubtful whether even an estate for life had passed to the wife if she had been alive, because the mortgages were coupled with only personal things, *as goods, leases, estates, mortgages, debts, &c.* which might be intended only of estates for years; and so much the rather, by reason of the words "*whereof I am possessed.*"

And certainly, had the latter point been agitated during the life of the wife, and the devisor been possessed of mortgages for years, it would have been decided against her; because the question, as taken up by the court, was, whether these mortgages in fee
were

were to be considered as real or personal estate? And the unanimous opinion was, that they were of the former description; in which case, the words of this will would not have attached upon them: besides, from the clause with the words, "*goods, chattels, leases, estates, mortgages, &c.*" it could not have been inferred that the testator had an intention of passing estates in fee simple, as the sentence, in which they were included, first took notice of an inferior kind of property; but the natural construction would have been, that the testator intended mortgages for years, which were of equal respectability, in consideration of law, with the leases and other property combined in the sweeping clause.

The force of this reasoning, however, would have been in some degree weakened, if the testator had not been possessed of any mortgages for years; because, in that case, either the word mortgages in the will must have been totally rejected, which would have been repugnant to every principle of construction; or, he must have been understood to mean such mortgages as he had: and the rather in this particular case, because at this time the question, whether mortgages were to be considered as real or

personal estate, turned upon nice and curious distinctions, in which few were conversant. And therefore, although if the testator had been possessed of such property as would have answered the words of the will, without expounding them to attach upon mortgages in fee, the Court would have leaned to a construction which would not injure the heir at law; it being a maxim that *he shall not be disinherited but by express words or necessary implication*. Yet, if no operation could have been given to the words of the will, unless they had been held to affect the mortgages in fee, I should think, that the subject matter being of so doubtful a nature, the intention would, in this case, have been strong enough to have outweighed the claim of the heir.

But now, the nature of mortgages being clearly understood, and the transaction (whether the mortgage be in fee, or for years, forfeited or not) until foreclosure, considered as a personal engagement only, in which the land is merely a pledge for the money, and remains in the mortgagor to every purpose (except that of securing the loan) the words, in the principal case, would receive a different construction, and carry all the
testator's

testator's interest in mortgages; whether in fee or for term of years.

This is evident from the operation of a devise of all a man's lands, tenements, and hereditaments; which words being in law particularly appropriated to real estates, and never applied to personal estates, unless when a contrary construction would be, clearly, repugnant to the intention of the testator, will not carry mortgages in fee, although forfeited, if the testator had other property to which those terms may be properly applied.

Thus where *L*, being seised of several manors, of lands in *H*, and of a great personal estate, having no issue, made his will, and, after devising of part to his wife for life, and other legacies, gave all other his lands, tenements, and hereditaments out of settlement to his nephew; *L*, subsequent to the making his will, foreclosed and had releases of the equity of redemption of some mortgages in fee; one question was, whether these mortgages passed by the will under the general words, lands, tenements, and hereditaments? And it was unanimously agreed by the Lord Chancellor, assisted by the Master of the Rolls, Lord Chief Justice

Sir Litton
Strode v.
Lady Ruffel
et al.
2 Vern. 621.
3 Chan. Rep.
90.
Vid. obser. on
this case.
3 P. Will. 61.
62.

Trevor, and Justice *Tracy*, that the mortgages in fee, although forfeited when the will was made, did not pass by these general words.

The same reason that induced the Court, in the case of *Wilkinson* and *Maryland*, to determine, that if any estate in mortgages in fee, passed by the words, "all the rest of my goods, chattels, leases, estates, mortgages, &c." it was an estate for life only, governed the decision in the case of Sir *Litton Strode* v. *Lady Russel*, that the testator's mortgages did not pass by the words "lands, tenements, and hereditaments;" namely, that the words used by the testator were not properly applicable to the subject matter, which it was contended they ought to affect, considered at the different periods at which those cases were determined; a mortgage in fee, when forfeited, being at the time of the decision upon the former case considered as a real estate, which, at the time of the latter decision, was settled to be only personal property; the estate, though mortgaged, continuing still to be the estate of the mortgagor, subject to the payment of the pledge which is upon it, and the mortgagee's right being only to the money due upon the land, not to the land itself.

Nor

Nor will loose words, comprising general ideas, added to the sweeping clause, lands, tenements, and hereditaments, enlarge the legal effect thereof, so as to make them extend to mortgages; especially, if the lands mortgaged be of larger value than the estates to which these words properly apply.

And therefore where *P*, seised of lands in the counties of *F*, *M*, and *D*, conveyed them to *G*, by way of mortgage, and *W* was party thereto, and covenanted to pay the money if *P* failed; in which case *G* was to convey to him, which on *P*'s neglect was done. *W* entered on the lands, and enjoyed them divers years; and being seised thereof, and also of other lands in other counties in *Wales* (whereof part lay in the county of *M*, as part of the mortgaged lands did) but of no lands in *F* and *D*, except those mortgaged, made his will, and thereby devised all his lands, tenements, and hereditaments, in the counties of *A*, *M*, and *C*, or in any or either of them, or *elsewhere* within the dominion of *Wales*, to *J* *W*, and his heirs, and devised a rent-charge of 80 *l.* *per annum*, issuing out of the same lands: and, after the bequest of several great sums and legacies, bequeathed all the rest of his goods, chattels, and personal estate what-

Sir John
Wynne *v.*
Sir Thomas
Littleton,
et al.
2 Ch. Ca. 51.
Sc. 1 Vern. 3.
Sc. 2 Vent.
351.
Sc. Swinb.
504.

foever (his debts, legacies, and funeral expences being first paid) unto his loving _____ whom he made sole executor of his last will, and left a blank unfilled up; the question was, whether the lands mortgaged should pass to J W by this devise, or, whether the administratrix should have them? And it was decreed in favour of the administratrix for these reasons; first, that the testator made special mention of the three counties in which his own lands of inheritance laid, not of the counties in which the mortgaged lands laid, but only added the general clause, *currente calamo*, or *elsewhere* within the dominion of *Wales*; that, having first descended to particulars, he had thereby so limited and circumscribed his intention that the general fortuitous clause could not open or enlarge it; for, that was but in the nature of an *et cetera*, which might serve to fetch in small parcels of land, that were the testator's own inheritance, laying out of the three counties particularly mentioned (of which, in truth, there were some) but could never reach the mortgaged lands which were of a different nature; and the rather in this case, because they were of great value, equivalent to, if not exceeding, the value of his other lands, and therefore might not pass
by

by such a general clause, as if only skirts and members of the other lands.

Secondly, because the will had charged the lands that passed, by the devise of *all his lands*, with a rent-charge for life, and no one could be thought so improvident as to grant a rent for life out of lands, which were every day redeemable.

But it was observed by the court, that it might have been otherwise; suppose the devise had been, of all his lands in the said three counties, and then, without more said, "that the rest of his personal estate should go to his executor;" for then, perhaps, the mortgaged lands would pass; as otherwise, there would have been nothing to answer, or make sense of that clause, "*and the residue of his personal estate, &c.*" for that would have implied that he had already devised some part of it, or at least evinced, that he meant part of it should have passed: but, as this case was, these words were well understood, and they effectually answered without any such construction; for, before that clause in the will, the testator had devised divers legacies that in the whole did amount unto 1500 *l*.

But, if the testator hath no other landed interest answering the description given in his will in point of situation and circumstances, except mortgages, they will pass by such general words, though not *technically* proper to the subject.

Clarke v.
Abbot.
Barnard. Rep.
457.
S. C. 2 Eq. Ca.
Abr. 606. 41.

Thus, in the case of *Clarke v. Abbot*, where I, possessed of a mortgage of the *Swan Inn* at *Chelsea*, made his will, and thereby devised to A and his heirs, "all his *freehold* messuages and garden grounds in *Chelsea*."—It was held by Lord *Hardwicke*, on a question, whether the mortgaged interest would pass by this description, that, as it did not appear that the testator had any other lands there, it certainly would.

Yet it is observable on this case, that the word "*freehold*," could with less propriety be applied to the case of a mortgage, *than* the words "*lands, tenements, and hereditaments*;" the latter being much more general in their nature, and more frequently used as sweeping terms, to comprize all property, not particularly described.

But after a decree for foreclosure *nisi*, and a *fortiori*, after such decree made absolute,
mortgaged

mortgaged estates devised by the mortgagee will pass by words applicable to a devise of his real property.

G being indebted to H, his brother, 640*l.* devised to him a mortgage of 693*l.* of which he had gotten a decree of foreclosure, but before the account was taken, or the mortgagor absolutely foreclosed, in these words, "And to my brother and his heirs, my other freehold estate in *Feversham*. *Et per Curiam*, the lands in mortgage, being devised as real estate, shall be considered as such between the devisor and devisee, and therefore though this legacy is greater than the debt, it shall not go in satisfaction of it.

Garret v.
Evers
Mosely 364.

If a devise be made of lands mortgaged, no decree, to redeem or be foreclosed, can be made against the heir of the devisor, but only against the mortgagor and his heirs.

How v.
Vigures,
supra, 166.

A devise of money on mortgage does not carry the interest due at the time of the death of the testator.

Thus, where R made his will, and thereby gave to T 300*l.* which he had at interest, secured by a mortgage on the estate of M; and also gave him all the messuages, lands, and

Roberts v.
Kyffin,
Barnard 259.
Sc. 2 Atk. 113.

tenements, conveyed for securing the payment of that money, *until the same shall be paid and discharged*; and, soon after making his will, died, at which time two months interest was due on the mortgage. The Lord Chancellor was of opinion, on exceptions to the Master's report, that only the principal sum of 300 *l.* which was secured by the mortgage, passed by the will, and that the devisee was not entitled to any interest due thereon. His Lordship said, that if there had been only the first clause in the will, it would have been extremely clear that only the principal sum passed thereby, and that the interest due did not pass; for, that clause could have conveyed nothing but the principal sum of 300 *l.* for which the mortgage was made a security. And his Lordship compared this to the case of a man's giving a bond to another, in which a third person was become bound to him; *there*, the principal sum only passed, and not the interest incurred upon it in the life of the party; the reason of which was, that the testator appeared to have intended to convey something that was certain, and not that which was uncertain. The question then was, whether the subsequent words "*And also I give him all the messuages, lands, &c.*" made any difference. Had
 - this

this clause gone no farther than to have conveyed the messuages, lands, and tenements, secured for the payment of the money, it might have been more doubtful, whether, under these words, the interest might not have passed as well as the principal. For it might have been said that those words were only descriptive of the lands that were mortgaged, and that, under those words, the testator might have intended to have given the whole that was secured, namely, the interest as well as the principal. However, his Lordship said that would have been a strained construction. But the words in this clause did not rest there, for they went on and said "*until the same should be paid and discharged,*" that was, until the 300*l.* be paid and discharged. And from thence an argument might be drawn, that nothing but the 300 *l.* was intended to pass: besides, the ordinary rule in the construction of wills, was, that *where a former clause in a will was express and particular, a subsequent clause that was dark and obscure should not enlarge it.*

A doubt is made by the reporter of the case of *Ellis v. Gnavas* (determined in the 32 and 33 *Car. 2.* which was between two and three years after the making of the statute of frauds) whether, if a mortgagee

Ellis v.
Gnavas,
2 Cha. Ca.
50. infra.

A a 4

had

had devised the mortgaged lands by will in writing, but not attested according to that statute (and the will had been proved in the Ecclesiastical Court) the devisee or the executor should have the land or money, when *clearly* the devisor meant the executor should not have it? The answer to which question seems to me, to depend upon the solution of another, namely, whether a devise by a mortgagee of lands, mortgaged to him, be within the fifth section of the statute of frauds? For if it be, the intention of the devisor, however strongly expressed, will not affect the property devised, or interrupt it in its course from the testator to those, to whom, by the designation of the law, it would have passed, had no such will been made or intention expressed: unless the circumstances required thereby (among which is that of being signed by the party devising, or some other in his presence and by his direction, and subscribed in his presence by three or more witnesses) had been actually complied with.

1 Show. 89.
Edlestone v.
Streaks,
Carth. 79. 81.
3 Mod. 260.
1 Show. 68.
88.
Lee v. Libb.
Carth. 35.

I have not, in the course of my researches upon this subject, met with any case expressly determined upon this point; the reason of which I apprehend to be, that it has been universally held to be out of the statute,
the

the words of which are, that, "all devises ^{2 Burr. 978.} of *lands and tenements* shall be in writing, &c." which words, being confined to real property only, clearly exclude mortgages. For, as the words lands, tenements, and hereditaments, in a devise, have been determined not to include mortgages, if there was any other subject in the will upon which they would operate, because those words are applicable to real property: so, they must be held to exclude mortgages, when made use of in a statute; the intent of which is, to restrain the disposition of real property by devise, unless the circumstances, thereby required, are complied with.

Sir Litton
Strode v.
Lady Russell,
supra, 170.

And, although I have found no case expressly determined upon this particular point, yet it is a conclusion necessarily resulting from the second resolution of the court in the last-mentioned case, *viz.* that although the testator, after making his will, foreclosed the mortgages, or obtained a release of the equity of redemption, yet they would not pass by the words, lands, tenements, and hereditaments, contained therein, but would go to the heir at law: the reason of which resolution is plainly that

Ibid.

that they are in the nature of new purchases, which the testator had not, at the time of the making his will; and therefore, by law, could not pass thereby, however strong the intention of the testator might be that they should.

C A P XII.

Of Priority of Incumbrances in Law and Equity, in which the Doctrine of tacking prior and latter Securities together is considered,

ON appeal to the House of Lords in the case of *Symes et al'. v. Symonds et al'*. it was settled, that if there be several mortgages or other incumbrances upon the same estate, the first incumbrancer who has the legal estate, shall be preferred to the second, and so on, according to the periods at which their respective securities bear date; and that mortgages were not to be preferred, but will take place according to priority, and as they stand in order of time with statutes, judgments, and recognizances.

Symes et al'.
creditors by
Sir W. Basset
*v. Symonds
et al'*. credi-
tors by mort-
gage.
1 Brown's
Parl. Ca. 66,

So, in another suit respecting the same estate, the case was, Sir *W B*, in 1687, borrowed

Lord Bristol
et al', credi-
tors of Sir

William
Basset v.
Hungerford
et al.
2 Vern. 524,
1 Eq. Ca.
Abr. 142.
Ca. 5.

rowed one thousand pounds of lady *B*, on a judgment; at that time there was a term of five hundred years kept on foot and assigned to *N*, lady *B*, and *S B*, to attend the inheritance. Afterwards, in 1688, Sir *W B* and *N*, one of the three trustees, assigned the term to *W* and *M*, for securing one thousand five hundred pounds borrowed of them by way of mortgage: then Sir *W. B.* together with the two other trustees, viz. Lady *B* and *S B*, assigned the term to *G*, for the better securing the 1000*l.* due to Lady *B*; the question was, whether *W* and *M* should have the benefit of the whole term, or only of a third part of it, one only of the three trustees having joined in the assignment? It was insisted that, although but one third part passed as to the legal estate, yet the *cestui que trust* could make a good assignment in equity, and Lady *B* ought to be bound thereby; because she lent her money on the credit of the judgment, and, before the assignment to *G*, had notice of the assignment to *W* and *M*. But the Lord Keeper determined, that, although there was a term attendant, yet a judgment was an equitable lien on the inheritance, and, consequently, affected the term; and therefore Lady *B*, having got the legal estate as to two thirds of the term in *G*, in trust for herself, should have

have the benefit thereof, although she had notice of the mortgage and assignment, made by the *cestui que trust*, jointly with one of the trustees.

So, where there was a first mortgage which was paid off, but no reconveyance, and next a *judgment creditor*, and the plaintiff, a second mortgagee, filed a bill against the first mortgagee, the mortgagor, and judgment creditor, to have a reconveyance from the first mortgagee (he being satisfied) which he acknowledged by answer; the first mortgagee, pending the suit, assigned the mortgage to the judgment creditor; and the Lord Chancellor declared this to be justifiable in both: and decreed that, unless the plaintiff, the second mortgagee, would redeem, and also pay off the debt by judgment, the bill should be dismissed.

Turner v.
Richmond,
2 Vern. 81.

We must here remark, with a view to some observations that will hereafter occur in this chapter, that, in the two last-mentioned cases, the assignments of the legal estate were not made with a view to alter the priorities amongst the claimants, but to preserve them as they originally stood.

But the last proposition, as to the discharging incumbrances, must be understood with this restriction, that the mortgagee be not guilty of any fraud or artifice, by concealing his mortgage, or otherwise, to induce another person to give credit to, or lend his money on, such subsequent security; for, if he be, the subsequent incumbrancer will gain a priority thereby.

Berrysford v.
Millward,
Barnard Rep.
101. Sc.
2 Atk. 49.
Vid. Sheph.
Prac. Counf.
482. pl. 9.
A quæ. if such
 cases not avoid
 prior claim at
 law as fraudu-
 lent.

Thus, where, on a treaty of marriage between *A* and *B* his wife, *C* the father of *A*, and *D* the father of *B*, had a meeting together; at which meeting *M*, who had a mortgage upon *C*'s estate, was accidentally present; *C* and *D* discoursed together on the subject, and talked of making a settlement upon the estate on which the mortgage to *M* was secured: *M* never mentioned to the father of *B* that he had such mortgage, but called out *C* and reminded him thereof. *M* then agreed with *C* that he would take his personal security for the money, and they returned into the room together, when an agreement was entered into between *C* and *D*, in the presence of *M*, to settle the estate in strict settlement. Afterwards the marriage took effect, and *M* brought an ejectment to recover the possession of this estate mortgagee; whereupon *A* and *B* his wife brought

brought a bill against *M* and *C*, in order to have a perpetual injunction: *M* admitted all the facts, but pretended not to remember any thing of the agreement to accept *C*'s personal security for the money lent. *C* was examined as a witness in the cause for both parties, and swore to the fact of that agreement: and the Lord Chancellor was of opinion, that the plaintiffs were well entitled to a perpetual injunction, and ought to be relieved under the *head of fraud*; for that *M* having voluntarily concealed his mortgage at the time of the treaty of marriage, was not entitled to have any benefit from it against the plaintiff.

The equity of the latter incumbrancer will be still much greater, if the first incumbrancer be concerned in transacting the subsequent security, and omit to inform him of the demand.

So, where *D*, *N*, and *H*, having lent *B* 8000*l.* upon a mortgage in fee of the manor of *F*, and on a statute in 1600*l.* penalty as a farther security; and *H* being a counsellor, and afterwards consulted by *J* as to a loan of 200*l.* to *B*, on a mortgage of the manor of *G*, encouraged him to lend his money, drew the mortgage-deed, and inserted therein

a co-

Draper et al.
v. Borlace
et al.
1 Vern. 370.

a covenant that the estate was free from incumbrances, making no mention of the statute which was taken, because *T* was supposed to be deficient. The question was, whether *H* should be admitted to take advantage of the statute to lessen *J*'s security upon the manor of *G*? And it was held he should not; for if he, who only concealed his incumbrance, should be postponed, much more ought *H* who was intrusted as counsel by the mortgagee, promoted the loan, and drew the conveyance with covenants that the estate was free from incumbrances.

Moratta et al.
v. Murgatroyd,
1 Will. Rep.
393.

And if a first mortgagee be a witness to a second mortgage deed, and, knowing the contents thereof, do not acquaint such second mortgagee with his former mortgage, this will give the latter a preference.

Ibid.

It is likewise said, that it will make no difference, although it be not in proof that the witness knew the contents of the second mortgage; for, since it does not appear but that he might have known them, the law will presume that every witness, who can write or read, is acquainted with the substance of a deed or instrument which he, having attested, undertakes to support by his evidence.

But

But the editor of *Peer Williams's* reports, 1 P. Will. 394. in a note added to the above observation, doubts the truth of the proposition, and questions whether the bare attesting a subsequent incumbrance, without other circumstances of presumptive notice, will postpone a prior incumbrancer, since, at that rate, a prior mortgagee or incumbrancer may, without any fraud, or ill intention on his side, be liable to be cheated of his security.— And so (he observes) he found it said by Lord King, in the author's (*Peer Williams*) report of an anonymous case, in Mich. term, 1732.

And Lord *Hardwicke*, before whom this point was agitated, in the case of *Wilford* and *Beezly*, said, “that he did not think
“that the bare attesting a deed as a witness,
“would create such a presumption of his
“knowledge of the contents, as to affect
“him with any fraud therein; for a witness
“is only to authenticate it, and not to be
“privy to the contents.”

Wilford v.
Beezly,
1 Vez. 6.

And Lord *Thurlow*, in the case of *Becket* and *Cordley*, seems to have been of a similar opinion with Lord *Hardwicke*, upon this subject; for
speaking

Becket v.
Cordley,
1 Bro. Chan.
Rep. 357.

speaking therein of the case of *Mocatta* and *Murgatroyd*, his Lordship says, " the first
 " mortgagee was a witness to the second
 " mortgage, and was therefore postponed.
 " I do not leave this as a case, which I should
 " determine in the same manner; for a witness
 " in practice is not privy to the contents of the
 " deed. The book refers to a case where Lord
 " *King* denies the law to be so."

But if any neglect can be imputed to a witness so circumstanced, it seems that would affect him, and give priority to a subsequent incumbrancer; for it is a principle of equity, that where, of two persons, one of whom has been guilty of a neglect, and the other has not, there must be a sufferer, the loss shall light on him from whose omission the mischief arises. The following case is a very strong instance of the strictness with which a Court of Equity enforces the above maxim; for it appears that no imputation of fraud was imputable to the person to whose case the rule was implied, nor of neglect, except in not being acquainted with the doctrine of satisfactions, which may justly be considered of the most refined nature.

Thus,

Thus, where *N*'s younger brother, having an annuity of 100*l.* *per annum* charged on lands by his father's will, contracted with *H* for sale thereof; *H* went to *N* and informed him of his intended purchase, desiring to know of him if his younger brother had a good title to it, and whether his father was seised in fee at the time of making the will, and if it had ever been revoked. *N* told him he believed his brother had a good title, and that he had paid him the annuity for twenty years; but at the same time informed him, that he heard there was a settlement made of his father's lands before the will, which was in the hands of *T*, but that he had never seen it, and therefore could not tell what were its contents; and encouraged the purchase, telling *H* he had not only paid his brother the annuity to that time, but had also paid his sisters three thousand pounds under the same will. The purchase was completed, and afterwards *N* got the settlement into his hands, and would have avoided the annuity, the lands being thereby intailed. *H*'s bill was to have the annuity decreed or repayment of his purchase-money; and though, on the hearing, there was no proof that *N* had any notice of the contents of this settlement at the time he promoted the purchase, yet the Lord Keeper

Hobbs v.
Norton,
1 Vern. 136.
Vid. 2 Eq. Ca.
Abr. 515. pl.
3. 9 Vin. Abr.
415. pl. 24.
Watts v.
Creswell.

decreed the payment of the annuity merely on the encouragement *N* gave *H* to proceed in completing the contract; for that it was a negligent thing in him not to have made himself acquainted with his own title, that he might have informed the purchaser of it, when he came to enquire of him.

And such constructive fraud not only binds the party himself personally, from whose negligence it arises, but also binds the lands, &c. charged.

Pearson v.
Morgan, 1
Bro. Chan.
Rep. 63. 2
Bro. Rep.
Chan. 388.*

Thus where *B*, the elder brother of *I B*, was under settlement entitled to a real estate, charged with 8000 *l.* for one younger child of the marriage, but subject to a proviso, that, if the father should give to any of his daughters, or younger sons, any money or lands, for or in advancement in marriage or *otherwise*, the value thereof should be deducted from the portion, unless he should by writing declare to the contrary. The father devised to *I B* 4000 *l.* after the death of his (the son's) mother, and the residue of his personal estate, and died. Then the elder son suffered a recovery by which he obtained the fee simple in the lands. Afterwards *I B* applied to *P* to lend him 3000 *l.* on the security of the 8000 *l.* portion, for which he assigned

assigned 5000*l.* part of the 8000*l.* as a security, and also entered into a bond in a penalty for the same. *P.*, previous to lending the 3000*l.* applied by his solicitor to *B.*, informing him of *I B*'s application, and desired to be informed by him, whether the 8000*l.* was a subsisting charge upon the estate, when *B.* declared that it was, and that *P.* might safely advance his money upon the security. *B.* also afterwards applied for, and obtained a sum of money to pay off the 8000*l.* portion; and gave *P*'s solicitor notice that he would pay off the 3000*l.* at the end of six months after the notice: *B.* dying soon after, the money was not paid, but from the death of his father, and down to his own death, he paid the interest of the 8000*l.* Upon his death the estate descended to his two daughters. *B.* had possession of the settlement, and knew of the advancements of the father to *I B*; but supposing them not to affect the portion, did not reveal the same to *P.* A bill was filed by the mortgagee against the daughters to have the 3000*l.* raised and paid out of the settled estate. They set up as a defence, that the bequest of the 4000*l.* and of the residue, was a satisfaction for the portion under the proviso inserted in the settlement. And it being held that the bequest was a satisfaction, it then became a question, whether *B.* had not

bound himself and the land notwithstanding, by his declaration " that the portion was a subsisting charge?" It was agreed on behalf of the daughters, that if *B* knowingly misrepresented the case to *P*'s attorney, it certainly must bind him. All the cases were that the person misrepresenting was bound by his own misrepresentation ; but this went something farther, namely, to bind the lands. If a man was guilty of a fraud, by which the land was affected, the misrepresentation would bind the land ; but if there was no fraud, the land could not be affected. It was the duty of *P*'s solicitor to make every enquiry ; he ought to have made the trustees parties. It was great negligence on his part not to take a legal security. He ought to have enquired what *I B* took under the will. The principle the court went upon, was by acting upon the conscience of the defendant in such cases ; if the defendant was acting against conscience, the court would apply a remedy, but there was in this case nothing against conscience. *B* was ignorant of the legal effect of the legacies. If then there was no fraud, there was nothing for the Court to relieve against, and the land could not be bound. But by *Buller*, Just. (who sat for the Chancellor, the only question is, whether *P* has a right

to have 3000*l.* raised for payment of his debt, out of the estate of *James*. It is argued, that this is not to be done unless there is such a fraud as to affect land, and that here was no fraud, but *B* acted innocently. It brings to my mind a case tried before me at *Guildhall*, by one merchant against another, for giving a false character of a third person, by which the plaintiff was induced to give him a credit, and lost his money; my direction to the jury was, that, if one man tells another a falsehood by which he is injured, the deceived person has his remedy by an action. Those who wish to maintain the daughter's case, argue, that *B* the father was a total stranger to the case, which argument admits the principle, that if he had been interested, the declaration would bind. Here the person of whom the question was asked, certainly had no interest. Fraud is a question of law, and of fact. It is always considered as a constructive fraud where the party knows the truth and conceals it, and such constructive fraud always makes the party liable. I think that here *B* knew of the proviso and advancements, and that in this court he was obliged to take notice of them. In fact he had express notice. It is not like the case of a latter deed re-

ferring to a former one. The enquiry was a very proper one on the part of *P*, and completely repelled any imputation of negligence in his agent, and the enquiry was properly made of the party immediately interested. *B*, at the time of the enquiry, had the equitable interest in the estate, and, upon the application, assured *P*, that he might safely lend his money. The enquiry was the most material *P* could make. If *B* admitted the term to be in existence, he must be bound by his admission. He had full notice, and induced *P* to lend his money, which was a fraud that would affect the daughter's estate. The term must, therefore, be held to be in force to secure the 3000*l*, and the trustees must raise that sum.

And if such subsequent mortgagee apply to a prior incumbrancer, to know if he hath any incumbrance or mortgage on the estate upon which he intends to take a security, and he denies that he hath any, he will lose his priority.

But, in this case, it will be necessary for such subsequent mortgagee, or his agent, to inform the prior incumbrancer that he is about to lend the mortgagor money, or otherwise he will not on denial lose
his

his priority ; for he is not bound to answer unless he knows of such intention, as the question may be put, merely to satisfy an impertinent curiosity.

Thus, where *R* had lent money to *S* upon a mortgage of his estate, and *I* being likewise about to lend *S* money, directed *G* to enquire of *R*, whether he had any incumbrance or mortgage on that estate, who denied that he had, and on a second application returned the same answer ; *R* acknowledged that *G* met him in a public market, and enquired of him what money *S* owed him, but denied that *G* informed him *I* was about to lend *S* money ; nor did *G*, on cross examination, take upon himself to swear he did ; the Lord Keeper directed an issue to try whether *G* told the defendant that the plaintiff was about to lend money on the estate of *S*, when he enquired what *S*'s debt was,

Ibbotson v. Rhodes,
2 Vern. 554.

And if there be several equitable interests affecting the same estate, they will attach upon it according to the respective periods at which they commenced ; for it is a maxim in equity as well as in law, that "*Qui prior est tempore potior est jure.*"

2 Vez. 477.
Ca. Temp.
Talbot 68.

Clarke v.
Abbot.
Barnard Rep,
457. Sc. 2 Eq.
Ca. Abr. 606.
41 Supra.

So, where *Job Smith* and *Samuel* his son mortgaged an estate by feoffment to *Winter*, and *Samuel* afterwards died, leaving *Elizabeth Smith* his heir, who married *Thomas Bromwich*; *Thomas* took an assignment of the mortgage in the name of *Anthony Bromwich* in trust for himself. Then *Thomas* mortgaged the same premises to *Elizabeth* his sister. Afterwards, *Thomas* devised these premises to *Anthony Abbot*, his grandson, and his heirs. At the time of making this will he had two daughters, *Anne*, married to *Robert Abbot*, and *Elizabeth*.—*Thomas* died, his wife surviving; then she died, and *Elizabeth* the daughter married *Peter Newley*. A bill was then brought by *Peter* and *Elizabeth* his wife, against *Robert Abbot* and *Anne* his wife, *Anthony Abbot*, and *Robert* the son of *Robert*, praying to be let into a redemption of a moiety, insisting, that *Thomas* had only a redeemable interest, and no power to dispose of the inheritance; and the Court decreed a redemption as to a moiety. This decree was never carried into execution, and *Anthony Abbot* was permitted to continue in possession until his death. In 1720, *Anthony* mortgaged the premises to *Taylor*, and, in 1724, again to *Nicholas*, and afterwards made several other mortgages to *Nicholas*, and then died, leaving *Anthony* his heir

heir at law. Then *Peter Newley* and *Elizabeth* his wife, and *Anne*, who was the widow of *Robert Abbot*, for divers considerations, conveyed the premises to *Robert* the son of *Robert* and his heirs, who afterwards took an assignment of *Taylor's* mortgage. In this same year *Nicholas* assigned his mortgages to *Clarke*. Then *Elizabeth* the sister of *Thomas* died, having first made her will and *Peter Newley* executor thereof, who also died leaving *Thomas Newley* executor of his will. Then *Thomas Newley* assigned all his interest in the mortgage to *Clarke*, who now brought his bill against *Robert Abbot*, *Anthony Abbot*, and *Elizabeth Abbot*, praying that an account might be taken of what money was due to *Robert*, on the assignment of the mortgage which was made to him by *Taylor*, and that the plaintiff might redeem him; and that *Anthony* and *Elizabeth* might come to an account as to the mortgages which were assigned to him, and be declared to pay those sums to the plaintiff, together with the money which he should pay to *Robert*; and, in default, that *Anthony* might be foreclosed. And the Lord Chancellor was of opinion, that the plaintiff was entitled to relief, as far as he could take that relief, within the compass of the former decree; that, if the plaintiff had got the legal estate

either

either himself, or in a trustee for him, so that he could have brought an ejectment and put the defendants to have been plaintiffs here, it might have deserved consideration, whether these defendants would have been entitled to have redeemed the present plaintiffs; but, as the plaintiff had not the legal estate, and was forced to come into equity, he must submit to be redeemed by *Anthony Abbot*, and could put no other terms upon his redeeming him, than such as fell within the compass of the former decree. His Lordship said that "*Qui prior est tempore potior est jure*," was a rule that held in equitable as well as in legal rights. That, in this case, *Robert* had the first equitable right, and therefore his mortgage must be paid off in preference to that of the plaintiff. It was true the plaintiff had taken in the mortgage made to *Elizabeth*, the sister of *Thomas*, which was prior to *Taylor's* mortgage under which the plaintiff claimed, but he had no legal estate, for want of taking in an assignment from *Anthony*, or at least for want of having him before the court in order to have a conveyance; and therefore *Robert*, who had the assignment of the mortgage which was made to *Taylor*, previous to any assignment of the mortgage which *Clarke* took, must be preferred to him: and his

Lordship

Lordship said, that it was never determined that a *puiſne* mortgagee could protect himself against a prior mortgagee, by purchasing a mortgage previous to his, where there was no legal estate in that mortgagee from whom he took his second assignment, especially without bringing the trustee of that mortgage before the court.

But this general rule admits of an exception if any one of the parties hath more equity to call for the legal estate than the others; for he that hath more equity shall be preferred,

2 Vez. 486.
Wilker v.
Bodington,
2 Vern. 608.
Infra.

So, in the case of *Wyndham v. Richardson et al'*. where the defendant acknowledged the money was not paid by him for a statute purchased in to cover his mortgage, but offered to pay it on the assigning the extent; it was urged, that *puiſne* mortgagees were, in such case, protected against a former mortgage on this reason only; because they were entitled in equity, by actually laying out their money on their mortgage, and were entitled in law, by purchasing in the former incumbrance: and so, having a title both in law and equity, he that had only a title in equity should not prevail against both. But the defendant had no title in law; for, though

Wyndham v.
Richardson
et al'.
2 Ch. Ca.
213.
Infra,

though the statute was extended, yet it was not assigned to him, he not having paid for it, and the plaintiffs offered to discharge him of that. But the Lord Chancellor was strongly against them on this point.

Another ground of exception to the general rule above referred to, is suggested by *a P. Will. 308.* Lord *Talbot* in the case of *Tourville* and *Naisb*, where two executors, being also residuary legatees, one of them for a valuable consideration assigned over part of his residuary share to *A B*, and then for a valuable consideration likewise assigned over his whole residuary share to the other executor and residuary legatee, who, as it was said, had no notice of the former assignment; whereupon it was insisted that this legacy of the surplus was a *chose* in action good only in equity, and not at law, in which case the assignment which was prior in time must take place, consequently that made to *A B* would prevail. To which it was replied, that though a legacy were a *chose* in action, yet when it was assigned to an executor, he, having a remedy at law, was in a different situation from a third person. But Lord *Talbot* said, that he did not see any difference; for the thing assigned was still but a *chose*

chose in action, which the executor himself could not come at, unless by action or suit, either in law or equity; but his Lordship farther observed, that it seemed, if it had been a mortgage made to the testator, and assigned by one of the executors to the other, the latter might have entered; but in the principal case the assignment was but of 1200*l.* due upon all the mortgages made to the testator from *A B* the father, and to *A* the son, which, not being recoverable otherwise than by a suit in equity, was clearly a *chose* in action.

It is a rule in equity, that, where several persons have equal equity, he amongst them that hath possession of the *legal estate*, may make all the advantages of it that the law admits of, and thereby protect his title, although it be subsequent in point of time; and his adversaries shall have no help in equity; for it will not disarm a purchaser, but, where the equity is equal, will leave the law to prevail.

Therefore, if there be several mortgagees, the last mortgagee, having lent his money upon a valuable consideration, and *without notice*, may, by purchasing in the precedent incumbrance, *which carries with it the legal estate*,

Boovey v.
Shipwick,
1 Ch. Ca.
201.
Churchill v.
Grove,
1 Ch. Ca. 35.
1 Vera. 187,
188.

2 Vez. 573.
Nagshaw v.
Yates,
Strange, 240.

estate, protect himself against any mortgagee subsequent to the first and prior to the last; for then he will have both law and equity upon his side.

2 Vez. 574.

This privilege of protection, by purchasing in prior incumbrances, originates in the particular constitution of the legal jurisdiction of this country. It could not happen but where the administration of law and equity was divided among different courts, and created different kinds of rights in estates; and is grounded upon that force which courts of the latter description necessarily and rightly give to the common law and to legal titles. For, although they break in upon the common law where necessity and conscience require it, still they allow superior force and strength to a legal title to estates, when not urged to do otherwise by those motives; and, consequently, where this is a legal title and equity on one side, and equity only upon the other, they will never suffer the side, in which both these rights concur, to be hurt by that in which one of them only is to be found.

Higgon v.
Callamy *et al*.
Vid. this case
as stated
2 P. Will. 493.

Thus, where S, having granted a rent-charge for 2000*l.* to H, mortgaged the premises for 1200*l.* to C, and afterwards,
those

those that had *C*'s interest, he being dead, bought in a judgment precedent to the grant of the rent-charge; *H*, exhibited his bill to discover what estates *C* claimed, and charged that *C* had notice of *H*'s rent-charge before he took the mortgage. The defendants pleaded the mortgage to *C*, and that afterwards hearing of precedent incumbrances, they bought in a legal title prior to the plaintiff's, and offered to assign all to the plaintiff, if he would pay what was due on the mortgage and on their new-acquired title; but, if he would not, they insisted that they ought not to be obliged to discover what that estate was they had bought in; and that their title ought not to be drawn under examination in equity; and, by way of answer, they denied that, to their knowledge and belief, *C* had any notice of the rent-charge when he lent the 1200*l.* which plea, on debate, was allowed to be good.

1 Ch. Ca.
149. *et vid.*
Churchill v.
Grove,
Ibid. 35.
Sc. Nelson 89.

And this point was fully settled in the following case by a solemn determination by Lord *Hale*, who gave it in the name of the "*creditors tabula in naufragio.*"

There *E* being seised of the manor of *W*, and of the manor of *M* mortgaged part of the

Marsh v. Lee.
2 Vent. 337.
S. C. 1 Ch.
Ca. 162.

the manor of *W* to *B*, in 1649, for 1000*l.* and, in 1655, acknowledged a statute to *B* of 800*l.* for the payment of 400*l.*; afterwards, in 1665, *E* mortgaged both these manors to *D* for 7000*l.* and then, in 1665, mortgaged the manor of *W* to *L* for 2000*l.* *L* having no notice of the former mortgages. *L* coming to have notice of the mortgage to *D* purchased in the two incumbrances to *B*, and then *W*, executor of *D*, sued *L*, who pleaded the whole matter; and the Court held, that *L* might make use of these incumbrances to protect his own mortgage, he having both law and equity for him. First, he had law, for *that* he had a precedent mortgage in 1649, and also the statute in 1655, and while these remained in force, *M* could not come in. Secondly, he had equity, for, though he had a subsequent mortgage, yet it being without notice, he ought to be relieved in Chancery.

But there is a distinction between the effect of purchasing in an outstanding judgment and purchasing in a statute; for the mortgagee can procure to himself, by taking in such security, no protection beyond the interest to which the owner of the security, taken in, is entitled; therefore as a judgment creditor can extend but a moiety, a

judgment will protect but a moiety in the hands of his assignees; but if the first incumbrance be a statute staple, which attaches upon all the land of the cognizor, a subsequent mortgagee buying that in, may hold all the land, and thereby protect himself, until at law the cognizor of the statute, by a *scire facias ad computandum*, has got the statute vacated, which can only be upon payment of the penalty; for equity will not, in such case, give any assistance against a third mortgagee without notice, until he is paid his mortgage as well as statute.

This doctrine of tacking has given rise to some nice distinctions in the nature of terms, and their applicability to this purpose.

Terms, so far as relate to the present purpose, may be distinguished into two kinds, *viz.* terms in gross, and terms attendant upon the inheritance.

Every term standing out, is at law a term in gross.

Terms to attend the inheritance originated in the time of Queen *Elizabeth*, when charging lands through the medium of raising terms was invented. Then marriage settle-

ments were made, and terms created to answer particular ends, as to secure jointures or portions, and mortgages were effected by limitation of terms; and when the objects of such terms were answered, it was found expedient to take assignments of the terms in trust to some persons to whom the inheritance was not limited, to protect it against intervening charges, and then such term was considered as belonging to the heir, and not to the executor, being but as a shadow kept on foot for particular purposes, and has a great resemblance to the case of charters and deeds which go with the inheritance to the heir.

But the practice of carving out terms for particular purposes becoming general, it followed as a necessary consequence, that some regulation became necessary with respect to the application of such terms after the purposes of their creation were answered, in cases where they were not assigned to attend the inheritance; this afforded a ground for the interposition of equity; it were plain that the legal owner of the term was not intended to derive any benefit from it, the Court of Chancery therefore said his conscience was affected, and that such term, though unappropriated, should not enure to his benefit,

nefit, but should be a trust for the creator of it inheritable; the justice of the case required this: the exclusion of the trustee from all benefit, was clearly in the contemplation of the parties. The specific trust being declared, by consequence, any other purpose was excluded. The specific purpose being answered, the trust resulted, because the holding to any other purpose than upon the trusts declared, could never be intended. Courts of equity, in conformity with the intention of parties, therefore said, that a term created for a particular purpose, should not be used for any other; but when the purpose was answered, should return to him who created it and his heirs, and be considered as a part of that inheritance out of which it proceeded.

Therefore, if a man seised in fee of lands, ^{2 Vent. 349.} raises a term for payment of his debts, without saying, that after his debts paid, the term shall cease, or attend the inheritance, yet equity of course says, that after the debts paid, the term shall attend the inheritance, because the trust is at an end.

So if a man seised in fee, creates a term for ninety-nine years, and declares some trusts of the term, viz. in trust for himself

for life, and afterwards in trust for his wife for life, and there stops without declaring any farther trusts, it is plain, and has been resolved in equity, that after the trusts that are declared shall be expired, the term shall, from thenceforth, be attendant upon the inheritance.

This principle, that when the trusts declared concerning a term determined, the term should attend the inheritance once established, led to another, namely, that if the tenant of the fee made a lease for years, without any consideration, and continued in possession, and declared no trust concerning the term, the trust would be *for him and his heirs*, a trust attending upon the reversion and inheritance; for the *res gestæ* evinced, that no benefit was intended the trustee.

Vid. 2 Vent.
399 or 355.

Therefore if a man seised in fee, make a lease for ninety-nine years, without any consideration, and continue in possession, this lease will be in trust for him and his heirs, a trust attending upon the reversion and inheritance.

1 P. Will. 376.
Goodnight v.
Sayles, 2 Wil-
son 329, and
Best v. Stam-
ford.

And the case is not altered, though a term taken in be expressly limited to the owner of the fee, his executors, and administrators.

And

And if a man purchases land, and takes the fee in his own name, and an assignment of a mortgage term in a trustee's name, the term shall attend the inheritance, although not so declared in the assignment of it; for the purchaser becomes both the hand to receive and the hand to pay off the mortgage money; the debt therefore is extinguished, and the mortgage term *qua* such gone; then, though the term itself is not extinguished in point of law, being in a trustee, yet it becomes attendant upon the inheritance, and must follow it in equity, as if it were made to do so by the act of the party.

Tiffin v. Tiffin, 1 Vern. 1.
Goodnight v. Sayles, 2 Will 329.

A feme sole seised in fee, upon her marriage with *A*, made a lease to trustees for 100 years, in trust for her husband for life, remainder to herself for life, remainder to the issue of that marriage, remainder to the wife, *her executors, and administrators*. The husband died without issue, she married a second husband and died, and the question was, whether this term should be attendant upon the inheritance, or should go to the husband as a term in gross? *Et per curiam*. It is a term attendant; because the trust for which it was created is at an end, the first husband being dead without issue.

Best v. Stamford, Salk. 154.
2 Vern. 520.

Best v. Stamford, Salk. 154.
2 Vern. 520.

So it is, where a term is raised to pay portions, and the portions are paid; or a termor purchases the inheritance in trust. The term shall be attendant.

Dowse v. Derivall, 1 Vern. 104.

And, except as to creditors, the same principle applies when the fee is placed in trust, and the term taken by the owner of the fee; for in that case it has been held, that the term in the hands of the owner of the inheritance, a freeman of *London*, shall not be subject to the custom of *London*, but shall attend the inheritance, though there be no declaration of trust that it shall do so.

And in all cases where the term would merge, if the term and fee were in one hand, the term being in another hand, will attend the inheritance.

All terms so circumstanced as that they would merge if vested in the owner of the inheritance, together with the inheritance, being considered both at law and in equity as terms attendant upon the inheritance, whether they be deemed so or not; a question arises, whether there be any distinction between terms limited expressly to attend the inheritance, and terms attending the inheritance as a resulting trust by implication of

of law, as to the capacity of being made use of to defend a third against a second mortgagee, where the former is free from the imputation of notice.

Previous to the case of *Willoughby* and *Willoughby*, a notion generally prevailed, that although a satisfied term resulting by operation of law, might, if got in, be made use of to protect a purchaser, a term once assigned to attend the inheritance, could not be so applied; for it could not enure to any other purpose than that prescribed, unless severed again by the owner of that inheritance; but in that case Lord *Hardwicke* explained this distinction, observing that its applicability to such purpose was an unavoidable consequence of the rule, that "*a purchaser for a valuable consideration, and without notice, shall not be hurt in equity.*"

Willoughby v. Willoughby,
In Chan. June
19, 1756.

The facts of the case were as follow :

George Willoughby, being seised in fee of an estate in *W* (subject to a mortgage term for 500 years) by articles dated 12th November, 1717, made upon his marriage, agrees to settle this estate to the use of himself for life, and afterwards to the intent that his wife should, out of the rents, &c. of part,

take an annuity of 250*l.* by way of jointure, with remainder, as to the whole estate, to the use of the first and other sons of the marriage in tail male, with remainder to *George Willoughby* in fee, with a power for the said *George* to charge the estate by will or deed, with the payment of 3000*l.* for the portions of his younger children. At this time the estate was subject to a mortgage for a term of years, as mentioned above, which, being satisfied, the said term was by indenture, dated 17th *August* 1718, assigned to *Shelling* and *Popham* and their executors, upon trust for *G W*, his heirs and assigns, to attend the inheritance. A settlement was made of the estate 14th *March* 1718, pursuant to the articles: 14th *March* 1750, *George Willoughby* made his will, and thereby executed the power reserved to him, by charging the estate with 3000*l.* for the portions of his younger children, and afterwards died, leaving *Jane* his widow, *Henry* his eldest son, three daughters, and a younger son *George*. *Henry*, having attained his age of twenty-one years, and being tenant in tail, suffered a recovery, and limited the estate to trustees in fee, to the use of such person and persons, and for such estate as he should by deed appoint. *Henry*, in pursuance of his power, by indenture dated in *June*, 1751, for securing

870*l.* which he had borrowed of *Jane* his mother, declared the trustees should stand seised, and the estate be charged with the payment of this sum and interest. The term of 500 years still standing out in *Shelling* and *Popbam*. Afterwards *Henry* borrowed 800*l.* of the defendant *Cripps*, and for securing this with interest, by indentures of lease and release, dated 14th and 15th *June* 1752, he conveyed the estate in mortgage to *Cripps* and his heirs. The same day *Shelling*, the surviving trustee, assigns the term of 500 years to *Boot*, upon trust, in the first place, to protect the estate limited to *Cripps* and his heirs from mesne incumbrances, and, *subject thereto*, to attend the inheritance. It appeared upon the evidence, that *Cripps* had full notice of the articles and settlement, and that, notwithstanding, in the release above he took a covenant from *Henry* that the estate was free from all incumbrances except the 500 years term and the several mesne assignments thereof; but it did not appear that he had notice of the mortgage to the mother. The bill was brought by *Jane* the mother, and the younger children, for payment (by sale of the estate) of the arrears of her jointure, the 3000*l.* to younger children, and the 870*l.* to the mother, and that then the rest of the incumbrances might be paid according

according to their order and priority. The defendant *Cripps* insisted that, as the legal estate was in *Boot*, his trustee, and as he was a purchaser for a valuable consideration and without notice of the first mortgage, he was entitled to be preferred in payment of his mortgage upon this principle, that he had both *law* and *equity* on his side, and the mother *only equity*.

Lord *Hardwicke* divided the case into two questions, the first of which is alone necessary to be noticed at present, namely,

Whether, this term being assigned to *Shelling* and *Popham* upon an *express* trust, *Cripps* could, *in equity*, have the benefit of it to protect this mortgage, if he had had no notice of any of them?

This question, his Lordship said, depended upon three considerations; namely,

First, What is the nature of a term to attend the inheritance?

Secondly, What kind of grantee is entitled to the protection of such a term; or, in other words, in whose hands such a term shall be allowed to protect the inheritance?

Thirdly,

Thirdly, Against what estate, charges, and incumbrances, the protection arising from such a term shall extend?

His Lordship upon the first said, that terms to attend the inheritance are the creatures of a court of equity, and were invented partly to protect real estates, and partly to keep them in a right channel: here arises a distinction between terms in gross, and terms to attend the inheritance, though at common law they are the same; for, *in equity*, such a term shall be applied according to the uses, estates, and charges which the owner of the inheritance has carved out of it. *In equity* the consideration always is, who has the real right *in conscience*; and where the termor for years is but a trustee for the owner of the inheritance, he shall not keep out the *cestui que* trust; and therefore the term is liable to all his charges. These terms were not known till Queen Elizabeth's time, as appears by *Pemberton's* argument in the Duke of Norfolk's case; before that time the law looked upon them with a jealous eye, as they tended to defeat the crown of its forfeitures, and the lord of the fruit of his tenures. And wherever a term is vested in a stranger in trust for the owner of the inheritance, this court has *always* said, that it shall

1 Vern. 104.

shall be liable to and affected by *all* the incumbrances created by the owner. Equity will unite the term and inheritance to keep the property entire; as where he who has the inheritance in tail suffers a recovery, the term will follow the uses declared upon that recovery. This doctrine has always had its full effect in cases between the heir of the owner of the inheritance, and the executor, though a distinction as to creditors has been made, which is not material in the present case. The following cases have been cited, viz. *Tiffen v. Tiffen*, 1 Ch. Ca. 49. 1 Vern. 1. *Best v. Stamford*, 2 Vern. 520. Prec. in Chan. 252. *Hayter and Rod*, 1 Wms. 360. *Whitchurch v. Whitchurch*, 2 Wms. 236. *Lord Dudley and Ward*, Prec. in Chan. 241, 242. Cha. Ca. 160. on Custom of *London*. These cases only prove this general proposition; namely, That, as between the heir in fee and in tail and the executor, this *doctrine* does take place. The Court sometimes disannexes the trust of a term to attend the inheritance from the strict legal fee, but still it does it *in support* of the *right*.

Upon the second consideration, What kind of grantee is entitled to the protection of such a term; or, in other words, in *whose hands* such a *term* shall be allowed to protect the inheritance?

Such a grantee must be a purchaser for a valuable consideration, a purchaser *bona fide*, not affected with any fraud or collusion, and without notice of any prior charge; for notice makes him come in fraudulently; and in this description of a purchaser I include a mortgagee. If such a purchaser has no notice of a prior incumbrance, and takes a defective conveyance of an estate, and an assignment of a term to attend the inheritance; in this case, he shall have the benefit of the term to protect this estate, and he may either defend his possession by it, or he may use it to recover his possession at law, though his adversary has the inheritance, which makes me say, this Court often *disannexes* the term to attend, &c. from the inheritance. This is the meaning when it is said, "that if a man has both law and equity on his side, he shall not be hurt here."

In *Wither v. Waddington*, Lord Cowper has laid it down as a rule in equity, that where a man is a purchaser *without* notice, he shall not be annoyed in equity, *not only* where he has a prior legal estate, *but where he has a better* title or right to call for the legal estate than the other. So, in this case, the defendant *Cripps* must have the better right to call for the assignment of this term.

2 Vern. 599,
600.
supra, 194,
et Sc. infra.

Thirdly,

Thirdly, Against what estate, charges, and incumbrances, the protection arising from such a term shall extend ?

The answer to this question may be general. It shall extend to *all* estates, charges, and incumbrances, created *intermediately* between the raising of the term, and the making the parties incumbrance; but it must have all these previous *qualifications*: it must be made *bona fide*: it must have *freedom* from *notice*; it must have the *first* and *last* right to call for an assignment of the term. It was admitted by the counsel, that it would be *so*, where the old term was *standing out* in the original grantee or mortgagee, and had never been assigned to attend the inheritance; but it was said first, that when it has been assigned upon an *express trust* to attend the inheritance, it *shall* attend all the estates carved out of that inheritance. Secondly, When a term is so assigned, it becomes and is so annexed to the inheritance, that it cannot be severed from it.

This is an attempt to establish a *distinction* between a term assigned upon an *express* declaration of trust to attend the inheritance, and a term declared to be *so* by the *construction* of this court. *Oxwick and Brockett, Abr. Ca. Eq. 355*, has been cited. This case is not

in the Register's book, and the minutes are so imperfect, nothing can be collected from it. It was argued, that where a term was *assigned* to attend the inheritance, that is *notice* to the mortgagee of certain incumbrances: but this is a mistake; for an assignment of a term to attend the inheritance *generally*, is *only* notice that there is an inheritance to attend, but *not* that the estate is bound by any other *incumbrance*. Such an assignment gives a purchaser *no* notice but what he has from the deed. But if, in such assignment, it be declared that the term is assigned to protect the *uses* of *such* a settlement, or the *uses* in *such* a deed, it will be *notice* of the *deed* or *settlement*, and of *all* the uses in them, and the *purchaser* is *bound* to find them out *at his peril*; and I have known cases wherein it has been assigned in this manner. Again, it has been said, that such a term is *so* annexed to the inheritance, that it will *go along* with *all* the estates which are carved out of it; so here, in the case of the *first* mortgage, where a new conveyance is made of the inheritance for a valuable consideration, the *term* will *follow* it, and the termor will *become* a trustee for the purchaser. I agree this will be so against the *grantor* and his *heirs*, and *all* claiming *under* him or them, either as volunteers, or *without notice*; and if

he

he convey a new estate of the inheritance, the trust is affected by it; but when a *new purchaser* for a *valuable consideration*, with *all* the qualifications aforesaid, gets *an assignment* of *such* a term, he comes in a *different degree*, and how can equity take it from him without contradicting *all their rules*? It is objected, that this will leave the inheritance to go *one way*, and the trust of a term another. It is not necessary to enter into all the cases where a term to attend the inheritance may be disannexed and turned into a term in gross. It may be done even where it is upon a contingency (Serjeant *Maynard* in the Duke of *Norfolk's* case.) It may be done at any time by the owner of the inheritance.

It may be objected, that, if such term is not *so* annexed to the inheritance as to go *along* with it, it will put it into the *power of the trustee* to assign it to whom he pleases. I take this case to be the same as that of trustees to preserve contingent remainders. If such trustees join in a conveyance to a purchaser for valuable consideration, who has *notice* of the trust, *such* purchaser is affected with the trust; but if he has *no notice*, the purchaser shall retain the estate, but the trustees shall make satisfaction. *Mansell v. Mansell*, 2 *Wms.* 612. So, here, if the
second

second mortgagee has had notice of the first mortgagee, he shall make no use of the term to his prejudice; and if he had no notice, the trustee who assigns it ought to make satisfaction. But, this doctrine would make the assignment of such term to a purchaser's own trustee such, that it would protect him against nothing at all; for if, wherever there is a charge made upon the inheritance for a valuable consideration, that draws after it so much of the trust of the term against the grantor, and then puisne mortgagee was to take it affected with that derivative trust, such puisne mortgagee would never be safe.

It was said, at the bar, to be a rule among the conveyancers, wherever they found an old term limited to attend the inheritance, *not to disturb or meddle with it.* I have enquired of a very able and experienced conveyancer (Mr. *Filmer*) and find there is no such general rule. It is true, Mr. *Ward*, of the *Temple*, declared it as his opinion; but, if he practised so, *that will not make it a general rule.* Where such a term has been assigned upon an express trust to attend the inheritance *as settled by such a deed*, and the conveyancer is satisfied *the uses of that deed have not been barred*, he may very safely rely upon it, especially in the cases of purchasers and mort-

gages, where the deeds are always taken in ; for, if he has the deeds and the assignment of the term in his hands, they *cannot* be made use of *against* him : but this will not make it a general rule. Several inconveniences have been objected ; but all these are over-balanced by the inconvenience that would happen by breaking into the rule, “ *that a purchaser for a valuable consideration, and without notice, shall not be hurt in equity.*” Collateral warranties, non-claim, descents cast, which are the wise policies of the law to quiet men’s possessions, are grounded upon the same principle. Upon the whole, I am of opinion, that if *Cripps* had had *no* notice of the jointure, portions, or other incumbrances, he would *in equity* have *been entitled* to the *benefit* of this term.

The opinion thrown out by Lord *Hardwicke* on this occasion, was corroborated by the opinion of the court of King’s Bench, in the following case :

Goodtitle on
Dem. of several
v. Morgan,
et al.

Jones, seised in fee of several estates, demised the same, in 1761, to *Aubrey*, for nine hundred and ninety nine years, by way of mortgage. Afterwards, in 1768, this term was assigned to *Lockwood* in trust for *Jones*, as to part of the lands, and in the mean

mean time to attend the inheritance; in 1767, *Jones* mortgaged to *Morgan*, and in July, 1769, to *David*. Both these mortgages were in fee. In December, 1769, *Jones* and *Lockwood* assigned the last-mentioned lands to *Morland*, his executors, &c. for the remainder of the term of nine hundred and ninety nine years, in trust for *Sprigg*, for securing 10,000 *l.* lent by *Sprigg* to *Jones*. Afterwards, *Jones*, by indentures of lease and release, mortgaged the same estates in fee to *Sprigg*, for securing the 10,000 *l.*

On the mortgage to *Sprigg*, all proper searches were made on his part for incumbrances, and he had all the title-deed that could be found delivered to him at the time he advanced his money, except the demise of the term for nine hundred and ninety nine years, and the assignments of it, which were kept in the hands of *Lockwood*, on account only of containing other premises in mortgage to *Lockwood*, and which were not included in the mortgage to *Sprigg*, nor assigned to *Morland*, his trustee, but counterparts of them were then delivered to *Sprigg*. On these facts the question on an ejectment was, whether *Morgan* and *David*, or *Sprigg*, should be preferred?

On the part of *Morgan* and *David* it was contended, that this term must be considered as attendant on the inheritance, and consequently at the times of the respective mortgages to them, the trustee of the term became their trustee, and the term could not be separated from the inheritance but by their consent. That if, previous to the conveyance to *Sprigg*, in 1769, *Morgan* and *David* had brought ejectments upon their mortgages, neither *Jones* nor *Lockwood*, his trustee, could have set up this term as a bar to their ejectments; then if *Jones* himself could not set up the term, it was absurd to say, that those who claimed under him might, for they could not claim a greater estate than he had. Then *Jones*, having parted with the inheritance, had no power afterwards to make any appointment of it differently. His power was gone, though it were collateral, by the conveyance of the land. *Sed per Ashurst*, Justice, no man ought to be so absurd as to make a purchase without looking at the title-deeds; if he is, he must take the consequence of his own negligence. If the first mortgagee had an ordinary precaution, he must have known that this term was then outstanding. And if he did know of it, and neglected to take an assignment of it, it was enabling the mortgagor to
commit

commit a fraud, by mortgaging the same estate again. By this, therefore, he became *particeps criminis*, and he must suffer the consequences of the fraud; and *Sprigg*, who has got the legal estate, must be preferred.

But it behoves such trustees to be very cautious how they act, if called upon to sever the term from the inheritance, lest they inadvertently be guilty of a breach of trust; for wherever a trust to attend the inheritance devolves upon a man, every time the *cestui que trust* makes any disposition of the lands, either by way of conveyance or incumbrance, the trustee of the term becomes from thenceforward a trustee for the grantee or incumbrancer to the extent or amount of his grant or incumbrance; and therefore any assignment by him of the legal estate on other trust than to attend the inheritance, made to any one who has not the prior or leading security or conveyance of the equitable estate during the term, will, if such trustee can be affected with notice, either actual or presumptive, be a breach of trust, for which the trustee will be answerable in a court of equity.

Therefore, before such trustee severs a term so assigned, in order to use it as a term

in gross, to secure mortgagees or the like, he ought to be satisfied, by the production of the title-deeds or other satisfactory evidence, that his *cestui que trust* has done no act to affect the inheritance; for it is to be observed, that when a trustee severs a term designated to attend the inheritance without being satisfied in this respect, he voluntarily takes upon himself to do an act which may vary the rights of those *whose rights* it is *his duty* to protect. Should a trustee voluntarily make a severance in such case, *after actual or presumptive knowledge*, that his *cestui que trust* was involved in incumbrances, there can be little doubt but that he would, at least, be saddled with costs, which may prove a very serious consideration to him; it is therefore most prudent *in such case* to decline acting, unless upon very sure grounds, if it be not with the direction, and under the indemnity of a court of equity.

From what has been observed, it seems prudent for mortgagors, in all cases where it can be done, to take assignments of terms to trustees nominated by themselves, rather than to leave such terms outstanding in strangers; but cases sometimes arise in which this cannot be accomplished. Frequently it becomes impracticable, after a length of time,

to find out the representatives of such trustees, in which case the owner cannot get in a complete title. In such cases the next best alternative is to be taken, which is to secure the possession of the title-deeds, taking particular care that he has the deed creating the trust term, and that by which it is assigned. A purchaser for a valuable consideration, having these in his possession, seems to be in no great danger from the term being outstanding; because it can never be set up against him but by a purchaser for a valuable consideration without notice, who gets an assignment of the legal estate in the term; and the fact of a purchaser taking an estate without the title-deeds, is, *prima facie*, at least a ground to presume notice against him, if not to make his purchase fraudulent.

But should a case arise, in which the non-possession of the title-deeds, and amongst others of the deeds creating the term, and the deed assigning it, can be accounted for in a satisfactory manner, either by such purchaser having had a probable cause assigned him, from whence he may presume that there were no title-deeds belonging to the estate, or of an incumbrancer taking his estate from one who had no right to the title-deeds, and who, therefore, could not

give them up, as a mortgagee of a reversion, the title-deeds in such case belonging to the tenant for life, it does not appear to me, that the possession of the title-deeds, though comprising among them both the deed creating and the deed assigning the term, would be a good defence against a prior purchaser or incumbrancer for a valuable consideration without notice, who should get an actual assignment of such term from the person in whom the legal estate therein should be vested,

If the prior incumbrance attach upon part of the estates comprised in the latter mortgage only, it will not protect more than what is comprised in the first security.

Per Lord
Hale,
2 Vent, 339.

And therefore, if a man, being seised of sixty acres, mortgage twenty to *A*, and then the whole to *B*, and then the whole to *C*, and afterwards *C* purchase in the first mortgage, *that* shall not protect more than the twenty acres; but it shall protect those twenty acres, so as *B* shall never recover them, until he pay *C* all the money due upon the first and last mortgage.

Supra,

And so it was determined in the case of *Marsh and Lee*,

But,

But, if the prior incumbrance, bought in, attach upon other estates, as well as upon those affected by the subsequent mortgage, the subsequent mortgagee shall hold all the estates comprised in the incumbrance bought in, until he be satisfied as well for his own debt as for what he paid in the purchase of the first mortgage. For, when he hath purchased the precedent incumbrance, which comprehendeth more than is contained in his mortgage, and is forfeited at law, it is but reasonable that the estate, which by no method can be evicted at law, should not be taken away by the mesne incumbrancers in a court of equity; unless such persons do equity, and pay the whole money due on both securities,

And therefore, where *D*, in 1651, made *B* a security out of the manor and rectory of *W*, and afterwards, in 1658, made *S* a security for money out of the rectory only, (*S* having no notice *then* of *B*'s security, which was for money also) and *S* hearing afterwards of *B*'s security, bought in a mortgage made to *D*, secured upon both the manor and rectory, which was precedent to *B*'s mortgage; the principal question in the case was, whether, as the defendant's security was only out of the rectory, and the

Sir Ralph
Bovey v.
Shipwick,
1 Cha. Cal.
201.
supra
1 Eq. Ca.
Abr. 323, 2.

the security he bought in was of both the manor and rectory, he should make use of *D*'s security as to the manor, after *D*'s debt was satisfied by the profits of the manor and rectory; or, whether *B* should not then be admitted to enjoy the manor, his security being as well of the manor as of the rectory, and *S* hold only the rectory till he was satisfied? And it was resolved and ruled by *Finch*, Lord Keeper, against the opinions of *Wild* and *Twisden*, Justices, that *S* should hold both the manor and rectory against *B*, until all due on both the securities was paid him.

Wyndham
et al'. v. Lord
Richardson
et al'. 2 Cha.
Ca. 212.
supra.

So, where *R* seised in fee, acknowledged a statute of 1000 *l.* to *I S* in 1663, and, on the 20th of June 1665, mortgaged the manor of *A* to the plaintiffs *W* and *K*, for 2000 *l.* and; two days afterwards, mortgaged part of the same to the defendant *B*, and then died, leaving the defendant *H* his heir; *B*, the second mortgagee, agreed with *M*, another defendant executor of *I S*, to put the statute in execution at his costs, and to pay *M* the debt due on the statute, after such time as the statute should be extended, and an assignment made thereof by *M* to *B*. The statute was extended in August 1672. The plaintiffs bill was, that on paying the debt on the

the statute, it might be set aside and assigned to them, and for a decree against *H* to pay or be foreclosed of redemption. One question was, whether the plaintiffs should be admitted to set aside the extent on payment of what was due on the statute without paying off the 2000 *l.* due on the second mortgage to *B*, until the statute was satisfied, not according to the justice of the debt in equity, but according to the extended value? It was objected, that the defendant *B* had not, in his mortgage made after the plaintiffs' mortgage, all the lands mortgaged before to the plaintiffs, but only part thereof, and that the statute covered the whole; and that, although the defendant *B* might, by the purchase of the statute, defend himself against the plaintiff, as to what was in his mortgage, yet he could not, as to such lands as were not therein. But the Chancellor was strongly against the plaintiffs on this point, and a question of fact arising, the case went off upon propositions.

And if a puisne incumbrancer or purchaser get in a satisfied judgment, or a prior statute, or judgment, or recognizance, although it be paid off, yet if he can make *use of it at law*, equity will not interfere to hinder him.

Edmunds *v.*
Povey, 1 Vern.
187. 2 Ch. Ca.
208. Hard.
318. *Sed vid.*
Hardres 172.
cont.

So

Sadler v. Bush,
2 Vern. 30.

So, where the plaintiff was a jointress, and the defendant a mortgagee subsequent, who had got an assignment of a statute that was precedent to the jointure, but was satisfied, and extended it on the lands mortgaged; the bill was to set aside the extent: but the Master of the Rolls decreed, that it should not be set aside, but upon payment of principal, interest, and costs.

Churchill v.
Grove, 1 Ch.
Ca. 35. Sc. in-
fra. 1 Eq. Ca.
Abr. 323. 3.

A prior incumbrance, satisfied at law, will protect a subsequent incumbrancer in equity, although no consideration were paid for it; or, if the consideration were by way of exchange; because, the having the deed, or an acquittance, is sufficient for that purpose.

Lord Chief
Justice Holt,
v. Mill et al.
2 Vern. 279.
Sc. 1 E. Ca.
Abr. 323. 3.

Thus, where the plaintiff lent *1* £ 600*l.* on mortgage, and afterwards, discovering that the estate was pre-mortgaged to the defendant, got in an old satisfied term, and then brought his bill to compel the defendant to redeem or be foreclosed; it was objected, that the plaintiff, in this case (as between him and the defendant, who was a purchaser) ought to have proved the actual lending and payment of the consideration money for such precedent incumbrance; and that the producing the deed, or an acquit-
tance

tance, was not sufficient: but the Court held that this was not necessary.

The law is the same, although the incumbrance, set up as a protection, be obtained by fraudulent means; as, where one, being a purchaser, came into a man's study, and there laid hand on a statute that would have fallen on his estate and put it in his pocket; in that case, he having obtained an advantage at law, the Court would not take it from him, though procured so unfairly, and by so ill a practice: *sed quære*.

2 Vern. 159.
Siddon v.
Charnell,
Bunbury 298.
Sherley v. Fag,
case cited,
1 Vern. 52,
53. 2 Vern. 58.
reported, 1 Ch.
Ca. 68. *sed con-*
tra Gilb. *lex*
pratoria 248.

But, where the prior incumbrance taken in is deficient in those requisites which are necessary to give it legal efficacy, no protection can be derived from it. As if a recognizance, bought in, hath not been enrolled in proper time.

And though the Court may, on application, interpose, and, by their special order, supply the defect as to persons who come *subsequent* to such interposition, yet it will not over-reach an intermediate incumbrancer.

Upon this principle, where a recognizance was inrolled by special order of the Court, after

Fothergill v.
Kendrick,
2 Vern. 234. *et*
vid. Will. 340.

after the time for enrolment had elapsed, and it so happened that the plaintiff, between the date and the enrolment of the recognizance, lent money to the conusor, and took a judgment for his security which was overreached by the recognizance, *that* being made good by the subsequent enrolment, the Court (the estate being in mortgage before, and the conusor having only an equity of redemption in him, so that neither the recognizance or mortgage could affect it without the assistance of the Court) inclined to give the preference to the judgment creditor.

So, if a judgment be not docketed within the time limited by the statute 4th and 5th *William and Mary*, c. 20, it will not protect a *puisse* incumbrancer, although the *eigne* incumbrancer hath actually notice of it at the time of making the mortgage.

Forshall v.
Coles, 7 Vin.
Abr. 54. P. C.
6. S. C. 2. E.
Ca. Abr.
592. 8.

Thus, where judgment was signed in *June* 1725, and a mortgage made to the plaintiff, who had notice of the judgment in 1728, but the judgment was not docketed, as appeared by an entry on the margin of the docket, until *January* 1730; the Master of the Rolls held, that the docket was not good, being made after the time limited by the statute, and

and that the mortgage had got the preference of the judgment by defect of the docket; and, as to the notice, it was not material, the statute being express, that judgments, not docketed, should lose their preference as to *purchasers and mortgagees*.

But this exception, as to judgments not docketed, is confined to cases where they are set up against purchasers or mortgagees, or heirs, or executors, or administrators in the administration of the effects of those of whom they are representatives.

And so it was held in the case of *Robinson et al'. v. Harrington*, which came before the Court upon exceptions to the Master's report. The case appeared to be this: in 1739 the defendant gave a bond for 400 l. to *Sarah Green*, and, in *Trinity Term* 1744, the obligee brought an action against the defendant upon this bond, who pleaded the general issue; and the issue-roll, upon which the same was entered, was regularly carried in of the term in which the issue was joined; but the cause was never tried, the parties being under an agreement to compromise the same: however, the plaintiff entered continuance upon the roll regularly, by *non misit breve*, till *Michaelmas Term* 1745, when the

Robinson et al'. v. Harrington et al'. Hil. Term, 1778.

defendant withdrew his plea and confessed judgment. The clerk of the judgments then entered up final judgment upon the issue-roll, but never took any docket of the same to the clerk of the essoigns, which, according to the statute 4th and 5th *W. and M. c.* 7, he ought to have done; when, therefore, the judgment creditor came before the Master, though the judgment appeared to be signed 29th *May*, 1745, he postponed it to other judgments of 1748, because *Mrs. Green's* judgment was not docketed with the clerk of the essoigns.

When the exception to the Master's report came on before the Court, it was contended, on behalf of *Mr. Strafford*, as the representative of *Mrs. Green*, that the Master ought to have placed her judgment in priority according to the signing, and that the statute of the 4th and 5th *W. and M.* made no alteration whatever in priority, as between judgment creditor and judgment creditor; for the act only said, "that no judgment, "not docketed and entered up in the books "pursuant to the statute, should affect any "lands as to purchasers or mortgagees, or "have any preference against heirs, executors, or administrators, in their administration of their ancestors, testators, or intestates

" testates estates." This, therefore, was not
 a case within that act; for the great object of
 the statute of *Will. and Ma.* as appeared most
 clearly by the preamble, was to enable
 purchasers and mortgagees to find out such
 judgments as affected the lands they were
 about to purchase or advance money upon,
 and likewise to give to heirs, executors, and
 administrators, an opportunity of enquiring
 what judgments were entered up against
 their ancestors, testators, or intestates, so that
 they might apply their estates and effects in
 a due course of administration; that, at com-
 mon law, judgments did not affect lands and
 tenements; but, by the statute of *Westminster*
 the 2d, the writ of *elegit* was given, whereby
 a plaintiff might extend a moiety of the
 lands and tenements, of which the defendant
 was seised at the time of the judgment *reco-*
vered; that however, as all judgments at
 common law were, by a fiction, supposed to
 be judgments of the first day of the term,
 there was no distinction respecting that mat-
 ter until the time of *Cha.* 2d, when it was
 enacted by the statute of frauds and perjuries,
 " that any judge or officer of any of his
 " Majesty's courts at *Westminster* that should
 " sign any judgment, should, at the signing
 " the same, without fee for doing the same,
 " set down the day of the month and year of
 Vol. I. E c " his

“ his so doing upon the paper, book, docket,
 “ or record, which he should sign, which
 “ day of the month and year should be al-
 “ so entered upon the margin of the roll of
 “ the record, where the said judgment
 “ should be entered.” And it was farther
 enacted, that such judgments, as against
 purchasers, *bona fide*, for a valuable consi-
 deration, of lands, tenements, and heredita-
 ments, to be charged thereby, should, in
 consideration of law, be judgments only from
 such time as they should be so signed; and
 should not relate to the first day of the term
 whereof they were entered, or the day of the
 return of the original, or filing the bill; any
 law, usage, &c. to the contrary, notwith-
 standing.

This Stat. only
 applies to the
 case of pur-
 chasers. Cre-
 ditors remain
 as before, and
 judgments
 bind on
 them from the
 term at which
 they are en-
 tered by fic-
 tion of law.,
 vid. Robinson
v. Tonge, 3
 P. Will. 398.
 and the note,
ibid. 400. E.

But, though this act of parliament settled
 all difficulties respecting the fiction of law,
 whereby judgments were supposed to be all
 of the first day of the term, by compelling
 the party to set down the particular period
 when the judgment was signed, and declar-
 ing that, as against purchases *bona fide* for
 a valuable consideration, the lands, tene-
 ments, and hereditaments, to be charged
 thereby, should be charged only from such
 time as the judgment was signed; yet, in as
 much as it did not compel the plaintiff to
 carry

carry in the judgment roll, purchasers, and others, were rendered almost incapable of discovering what judgments were recovered. And therefore the statute of 4th and 5th *W. and M. c.* 20, to remedy that inconvenience, directed that all judgments should be docketed, and entered with the particular officers of such court; and that, unless they were so docketed, they should not affect any lands or tenements as to purchasers or mortgagees; or have any preference against heirs, executors, or administrators, in their administration of their ancestors, testators, or intestates estates. But this did not take away the right which a judgment creditor had by the statute of *Westminster* to extend the lands of his debtor; it only laid him under particular restrictions in particular cases, which *Mr. Strafford* did not come within the meaning of.

It was farther contended and admitted, that if *Mr. Strafford* had sued out an *elegit*, and brought an ejectment to recover a moiety of the land of his debtor, he might have laid his demise on the day on which the judgment was recovered; which plainly proved that the lands were affected from the time of the judgment recovered, and not from the time of the docketing. For, if

there had been two judgment creditors of the same day, one docketed and the other not docketed; and the undocketed creditor had got possession, by virtue of an *elegit*, the docketed judgment creditor could not oust or eject him from the possession, till his debt had been fully satisfied out of the rents and profits; which was agreed to by the Court; and Mr. *Strafford* ordered to stand in priority, according to the signing of his judgment, and his exception allowed.

A *puisne* mortgagee cannot be deprived of the benefit of a prior judgment, bought in, by a release surreptitiously procured by the intermediate incumbrancer.

Era of
Huntingdon
v. Grenville,
1 Vern. 49.

Thus, where a *mesne* mortgagee, having notice that a *puisne* incumbrancer had bought up a statute precedent to his mortgage, the conusee of which was dead, took out letters of administration *de bonis non* to the conusee of the first statute, in order to release it, and procured the officer of the petty bag to vacate the same; the Court would not suffer him to profit thereby; but decreed, that the *puisne* mortgagee should be restored, and put in the same plight as if the statute had been still in force, and should go to an account upon it; and, if it were already satisfied,

tisfied, or the *mesne* mortgagee would pay what remained due thereupon, then he should be let in.

The advantage to be derived from getting in a precedent judgment, depends upon the different procedure of the courts of law and equity, in investigating the account on an extent; for, although lands are generally extended at much less than their true value, yet, at common law, the conusor, or he that claims under him, has no relief but by bringing a *scire facias ad computand.* in which the conusee does not account according to the true value, but according to the *extended value*, and for the whole statute. Whereas, in this case, on a suit in a court of equity, the conusor may bring the conusee to account for what he hath *actually* received; and shall recover all above the debt, the payment of that being all he is in equity entitled unto.

² Vent. 338.

³ Atk. 518.

⁴ Co, 69. b.

But, where the assignee of the statute extended is also mortgagee, and consequently a creditor for a farther sum, *there* he hath equal equity on his side to retain the lands until he be satisfied, both for the statute and the mortgage; therefore he will not be brought to account for what he hath received

above the statute debt, on the extended value, unless he hath received enough to satisfy his mortgage also. Consequently, if a *mesne* mortgagee would take off a statute in the hands of a *puisne* mortgagee, by a suit in equity, the account must be, as at law, upon the extended value for what is due on the statute and damages,

The Earl of
Huntingdon
v. Grenville,
1 Vern. 52,
supra,

And, in such case, where a statute, recognizance, or judgment, is taken in by a mortgagee to defend a subsequent incumbrance, he will be no farther or longer protected by it, than until he hath received so much of the profits as will satisfy the original security, on the extended value: for *then*, it will be avoidable by a *scire facias ad computandum*, or by an account to be taken in the Court of Chancery.

Brace v.
Duchess of
Marlborough,
2 Will. Rep.
491.
2 Vez. 662.
Sed vid.
Wright v.
Pilling,
Gilb. Rep.
Eq. 151.
2 C. Pre.
Ch. 494.

Here we must observe the distinction between the preceding cases, and cases where a judgment creditor, or creditor by statute or recognizance, buys in a first mortgage; for he cannot tack or unite this to his judgment, &c. so as to gain a preference thereby, because such creditor cannot be called a purchaser, nor hath he any right to the land; he hath neither *jus in re* nor *ad rem*, and therefore, though he release all
his

his right to the land, he may extend it afterwards. All that he hath by the judgment, is a lien upon the land; but it is not certain whether he ever will make use thereof; for he may recover the debt out of the goods of the conusor by *scire facias*, or may take the body, and then, during the defendant's life, he can have no other execution. Besides, the judgment-creditor doth not lend his money upon the immediate view or contemplation of the conusor's real estate; for lands afterwards purchased, may be extended upon the judgment; nor is he deceived or defrauded, although the conusor of the judgment hath before mortgaged his real estate, as is the case of a mortgagee, if the mortgagor hath before mortgaged his land to another.

Thus, where *B* made a mortgage of his estate, and afterwards became indebted to *H* in 60 *l.* and then conveyed to *S*, in trust, in the first place, to pay a debt due to himself, and subjected thereto all *B*'s other debts in average; then *S* tendered the money to the mortgagee, which the mortgagee refused, and afterwards he assigned the mortgage to *H*; then *H* obtained judgment against *B* on his bond for the 60 *l.* after which *S* sold to the plaintiffs, who, not

Stephenson
v. Hayward,
Pre. Ch. 310,

having paid their purchase-money, preferred their bill against the mortgagees and *H* to redeem: and it was decreed that the plaintiffs should redeem *H*'s mortgage, and that the judgment should be paid but in proportion; for though *H* had a title at law, and it was insisted that this judgment would affect the resulting equity in *B*, if there was more than sufficient to pay his debts, yet the conveyance made for the payment of debts being a good conveyance, and prior to the judgment, *that*, being subsequent, could not affect the estate.

Breerton v.
Jones,
1 Eq. Ca.
Abr. 325. 10.

So, where *A* mortgaged his estate to *B*, and then assigned the equity of redemption to *C*: afterwards *D* obtained a judgment against *A*, and procured an assignment of *B*'s mortgage; then *C* tendered the money due on the first mortgage to *D*, who had notice of the assignment of the equity of redemption, at the time of his purchasing in the first mortgage: It was objected, that *D*, having the legal estate in him by the assignment of the forfeited mortgage, and *C* having only an equitable interest, not supported by the legal estate, he ought to pay both monies to *D*; but the Court resolved that *C* should redeem, paying only the money due on the mortgage.

There

There is indeed a case, in which the Court may be thought to have infringed upon this rule, which was, where *A*, the plaintiff, had lent money on several notes of different dates, each of them in words to this effect; "Received of *A*, —*l*, to be secured on mortgage of my *Stokeball* estate;" and the drawer had, previously to his drawing these notes, made a mortgage of his estate to the defendant. *A*, to cover the sums lent on the notes, bought in a mortgage which was made prior to the defendant's: and Lord *Hardwicke* was of opinion, that *A* should thereby protect himself against the defendant's mortgage; and should be paid the money lent upon the notes, as well as what was due to him upon the assignment of the first mortgage,

Matthew v.
Cartwright,
2 Atk. 342.

But it appears to me that this case is clearly distinguishable from the common one of a creditor by judgment, or statute, purchasing in a prior incumbrance to protect himself, which, as hath been said, he will not be permitted to do; for these memorandums seem to fall, more properly, under the description of agreements for securing the money lent by mortgage, than of notes for the payment thereof; and consequently, the Court, considering *that* as done, which, upon
a bill

a bill to compel a specific performance of these agreements, they would have directed to *be* done, looked upon this case as not distinguishable from the ordinary case of a *puisne* mortgagee purchasing in a prior incumbrance to protect himself.

So a statute extended may, notwithstanding this rule, be made use of to protect the conusee, as to a farther sum lent by him, against a mortgage, or security, taken by a *mesne* incumbrancer; for, the conusee being entitled, at law, to hold the estate until he be satisfied his original debt at the extended value, the Court will not interpose to take it from him, when he hath a farther demand; for *that* gives him an equity to retain it against the *mesne* mortgagee, which the latter cannot over-reach, but on gaining a greater equity to himself by discharging both debts.

Sir John
Kedworth v.
Josias Pri-
mate,
Hard. 318.

Thus, where a man acknowledged a statute in the penal sum of 1500 *l.* for payment of 800 *l.* with interest; and then, it being forfeited, and the lands extended thereupon at a certain annual value, settled the same lands in tail, for a good and valuable consideration; afterwards he borrowed more money of the conusee, articles having been
first

first drawn between them, whereby it was agreed, that the statute and extent should stand as a security for the farther sum borrowed. The conusor being dead, and the principal sum of 800*l.* with interest, satisfied by perception of profits or otherwise, the plaintiff, tenant in tail under the settlement, filed his bill to account at the real value; but it was held by Chief Baron *Hale*, and all the Court, that no relief could be given against the penalty of the statute, the equity being equal, and the law on the side of the defendant.

A prior mortgage purchased in, will be no protection to a *puisne* mortgagee, unless it be forfeited; for, until then, the estate remains, as it was at common law, redeemable upon performance of the condition stipulated,

*Hitchcock
et al'. v.
Sedgwick
et al'.
2 Vern. 153.*

And a *puisne* mortgagee, who purchaseth in a prior security to protect his own, shall not only hold it until he be paid his debt, and reimbursed the money advanced by him to purchase it; but until he hath received all the money, and arrears of interest, due on the security bought in, as well as upon his own,

*Darcy v.
Hale,
1 Vern. 49.*

And

Goddard v.
Camplin,
3 Ch. Ca. 119.

And, as a *puisne* mortgagee may tack a prior incumbrance, that brings with it the legal estate, to his own, and thereby protect himself against intervening charges thereon; so, a mortgagee *eigne*, having the legal estate, may tack a subsequent sum advanced by him upon the former security, to his prior mortgage, and thereby protect himself against *mesne* incumbrances.

Blackstone v.
Moreland,
2 Ch. Ca. 20.

Thus, where *A* had an annuity charged on the manor of *S*, and *B* an estate therein liable to the annuity, and *C* an interest subsequent to both by mortgage; *B* having no notice of *C*'s interest, treated with him in the reversion in fee, who desired to borrow money of him, and thereupon purchased *A*'s interest, and for that, and by way of money lent to the reversioner, paid 900*l.* but there was no more than 500*l.* due to *A*; *C* exhibited his bill against *A* and *B*, to redeem them on payment of their debts; and the question was, whether *C* should pay *B* any more than the mortgage-money he had originally lent, and the 500*l.* paid by him, which was due to *A*? And it was decreed, that he should pay the whole 900*l.* advanced.

Shepperd v.
Titley,
2 Atk. 352.

So, if there be first and second mortgagee, and the first lend money after the last mort-

mortgage made, taking a *judgment* as security, he may tack this to his mortgage to protect himself against the second mortgagee, for he hath the legal estate and the judgment, *which*, though it passeth no interest, presently, in the land, operates as a *lien*.

4th resolution
in *Brace v.*
Duchess of
Marlborough,
2 Will. 494,
2 Vez. 662,
supra, 224.

But the farther sum advanced must be to one who has a right to charge the estate in question. Therefore where *I C*, the grandfather of *C*, made a mortgage of lands in fee to *H*, and then having two sons, *A* and *B*, devised the equity of redemption to his youngest son *B*, and his heirs, and died; *B* entered into the mortgaged lands, and enjoyed the same two years, and then died, leaving a son an infant. After *B*'s death, his elder brother *A* entered on these lands, and having occasion for money, joined with the mortgagee in an assignment of the mortgage to another person, of whom he borrowed a farther sum, and which the assignee advanced, having no notice of the will of *John Cooper*. Then the heir of *B* came of age, and exhibited a bill to be let into the equity of redemption upon the foot of the first mortgage. And on his part it was insisted, that the assignee could be in no better

con-

Cooper v.
Cooper,
Nelson's
Rep. 153

condition than the mortgagee, and that, if there had been twenty assignments for more money, if the mortgagor or he who legally represented him had not joined, he should not be barred, but ought to be relieved. On the other side it was contended, that the assignee was a purchaser for a valuable consideration without notice of this incumbrance by the will, and that he had a good title, having taken an assignment from the mortgagee, wherein the visible heir of the mortgagor was a party, and therefore, that if the heir would redeem, he ought to pay the whole principal sum and interest. But the Court was of opinion, and decreed that the heir should be let into the equity of redemption upon the foot of the first mortgage.

Smithson v.
Thompson,
1 Atk. 520.

And where *A* had a prior judgment, and a mortgage likewise on the estate of *B*; and a subsequent judgment creditor, but prior in time to the mortgage, brought a bill in chancery, praying a sale of the mortgagor's estate, who was likewise willing and desirous to sell; *per curiam*, here *A* is not a subsequent incumbrancer buying in a prior, but is the first of the incumbrancers, who has advanced more money on a second incumbrance. Where the *first incumbrancer* by

judgment has likewise a mortgage upon the estate, notwithstanding there is another judgment, prior in time to the mortgage, yet if the mortgagee had no notice of such judgment, the creditor upon the second judgment shall not come into a court of equity, and pray a sale of the estate so mortgaged, without paying off the principal and interest, both of the first judgment and the mortgage; for it would be very hard, if the defendant should be in a worse condition, with a prior incumbrance in his favour, than a mortgagee without notice of a prior judgment would be.

But, if one who hath a first mortgage, purchase in a subsequent judgment, without the consent of the mortgagor, a *mesne* mortgagee, or assignee of the equity of redemption, will not be obliged to pay the money due on both securities, in order to redeem; for such transaction of the mortgagee tended only to load the estate, without the consent of the owner, where he had no prospect of bettering his own security.

Breerton v.
Jones.
1 E. Ca. Abr.
326. 11.
supra, 226.

And, if the first mortgagee hath notice of the intervening incumbrance, at the time of his lending more money upon a judgment

ment or otherwise, he will not be permitted to tack them together against the *mesne* mortgagee.

Cafon et al.
v. Round et
al.
Prec. Ch. 226.

Thus, where *K*, having a prior mortgage of certain lands, where *C* had a mortgage subsequent, lent a farther sum to the mortgagor, on a statute; *C* alledged that *K* had notice of his mortgage, before the last money lent: *K*, by his answer, did not deny notice positively, but evasively; and *C* could not prove notice, until after the lending the last money; yet, because *K* had not denied notice positively, the Court decreed a redemption, on payment of the first money only.

3 Atk. 238.
2 Ca. Ch. 35.
1 Ch. Ca.
119.

And the law is the same in case of purchasing in prior securities, to protect subsequent incumbrances; it will not avail the purchaser, if he had notice of the *mesne* incumbrance, at the time he advanced his money on such subsequent security; for it is the purchasing, without notice, that gives him equal equity with the *mesne* incumbrancer; and, if a man will purchase with notice of another's right, his giving a valuable consideration will not avail him; for he throws away his money voluntarily, and of his own free will.

It seems, however, that this rule respecting notice, admits of an exception, where a man first mortgages land by a defective conveyance, and afterwards to a second person, by an assurance that is good and effectual, with notice of the former; for, in this case, the second shall prevail notwithstanding; because the legal title is, *ab initio*, in him, and equity will not interpose to wrest it from him, where both are equally upon a valuable consideration.

Burgh v.
Francis.
1 Eq. Ca.
Abr. 320, 1.

The following case seems to have been decided upon this ground; for unless the subsequent purchaser for a valuable consideration, who had a complete title in law, could be charged with fraud by *reason of notice*, there appears to be no pretence upon which the prior purchaser for valuable consideration likewise, but whose title was defective, could apply for relief; because, as between two purchasers upon the like considerations, that which has the complete title in law must prevail. There *Richard Wiseman*, son and heir apparent of Sir *Richard Wiseman*, intermarried with *Winifred Barrington*, entitled to a portion of 4000*l.* and brought a bill against his wife's trustees; whereupon a decree was had to pay him his wife's fortune, upon making a competent settlement;

Ofwick et al.
v. Plumer et
al. Pasch.
1708.
3 Bac. Abr.
644.

or, upon failure thereof, the fortune to be invested in lands by the approbation of the Master. And, upon the Master's report, that no competent settlement could be made by *Richard* the son, it was, by choice of parties, invested in lands of Sir *Richard*, the father, of equal value; part of which lands happened to be eight acres of copyhold, which, in the settlement, were limited and declared, apart from the freehold, to be to the use of the issue of the marriage in common form, and afterwards in fee to the son, with a covenant from Sir *Richard* to surrender the copyhold. The wife died without issue, and the son mortgaged both copyhold and freehold together, for a valuable consideration, to *Oswick* and others, plaintiffs, but without any surrender. The son died, and the lands descended to *Elizabeth*, his sister, and heir at law; then the mortgagees foreclosed *Elizabeth*, by a decree of the Court, and entered and took possession; to whom, being in possession, *Elizabeth* released and confirmed the estate in fee. Afterwards, Sir *Richard*, the father, having been out of possession of the premises from the time of the settlement, which was made thirteen years before, *surrendered the copyhold land to the defendant Plumer, for a valuable consideration: Plumer* was admitted, and

and brought his ejectment; and the mortgagees brought their bills to be relieved, which were dismissed by the Master of the Rolls, on solemn argument, with costs; for that the Court would not supply the defect of a surrender, against a person that came in by title, upon surrender of the same premises; which decree was, on rehearing, confirmed by Lord *Cowper*.

We must here remark a distinction that hath been taken between the preceding case, and cases where the subsequent creditors have demands, which, although they are liens upon, yet are not considered as specifically charging the lands; as equity will enforce a defective conveyance against claimants of the latter description; for, as they did not originally take the lands for their security, and come in under the very person that is obliged in conscience to make the defective security good, they are considered as standing in his place, and will therefore be postponed, until such defective security be satisfied.

Burgh v. Francis,
3 Bac. Abr. 643.
1 Eq. Ca. Abr. 320, 1.
et vid.
2 Will. Rep. 491.
1 Will. 279.
Ca. T. Finch, 28.

This point was settled so early as Lord Keeper *Bridgman's* time, in the case of *Burgh* and *Francis*, the decree in which cause was affirmed by Lord Chancellor *Nottingham*.

Burgh v. Francis
Finch's Rep. 28. Nels. Rep. 183.

There the ancestor made a defective mortgage in fee for 500 *l.* it being made by way of feoffment without livery, and afterwards the heir confessed several judgments on bond debts due from the ancestor. And the question was, whether the judgments ought to incumber the mortgaged premises until the mortgage be paid off? And Lord *Nottingham* determined that they ought not; for that the debt due upon the mortgage did originally charge the land, which the debts by bond did not, till they were reduced into judgments; and although the mortgage was defective in point of law for want of livery, yet equity, which supplied that defect, did still charge the land, and it ought not to be in the power of the heir at law to charge it, by acknowledging judgments in prejudice to such equity: the rather because the mortgagor had covenanted for him and his heirs to make any farther assurance, so that when the land descended upon the heir charged with this mortgage, he was in the nature of a trustee for the mortgagee till the money was paid, and could not incumber it; and though the creditors had not any notice of this mortgage, yet they should be bound in this case; because they were not put in a worse condition than they ought to be, namely, to be postponed to the mortgage.

Upon

Upon this principle, in a case where *A* surrendered his copyhold, by way of mortgage for money lent, and the surrender was not presented at the next court, according to the custom of the manor; and then *A* became a bankrupt, and the assignees were admitted, and brought their ejectment; and the surrenderee of the copyhold brought his bill in equity to be relieved, Lord *Cowper* granted a perpetual injunction in behalf of the surrenderee; and, although it was urged that the creditors of the bankruptcy were equally upon valuable considerations, as the surrenderee, and, having the title at law, ought to be preferred, yet that argument was over-ruled; because the other creditors of the bankrupt did not lend on the credit of the land, as the mortgagee did; and therefore, where such creditors came, *under* the bankrupt, to charge the lands, they ought to stand in his place, and come under the same obligation of conscience to make good the defective security.

Taylor v. Wheeler,
2 Vern. 564.
2 Salk. 449.
3 Bacon Abr. 644. 1 Will. 280.

And the reason of this difference is, that where there are two persons that have equal equity (as was the case in *Oswick* and *Plumer*, both being equally purchasers of the same property for a valuable consideration) there, those that have the legal

title shall prevail, because there is no equity, to take from such person the title that he hath gained at law; but, if the contending parties in equity have not equal equity (as was the case in *Burgh v. Francis*, and *Taylor v. Wheeler*, because the one creditor had intended to secure himself by the mortgage of the copyhold, whereas the other creditors had trusted merely to the bankrupt's personal security, and, consequently, had not equal equity to have the land applied for the payment of their debts, as the former, who looked to that in particular) those that have the greatest equity, shall be relieved against the legal title.

Also, if a clause be contained in the first mortgage-deed, making it a security for farther sums borrowed, subsequent loans will have relation to, and be taken as part of, the original transaction; and they must be paid before a second mortgage intervening, although the first mortgagee had notice of it at the time of advancing more money, if the second mortgagee had notice of the clause in the first mortgage.

Gordon v.
Graham,
7 Vol. Vin.
Abr. 52. pl.
3.

Thus, where *A* mortgaged his estates to *B* for a term of years, to secure a sum of money already lent to *A*, and also all such other

other sums as should thereafter be lent or advanced to him, *A* made a second mortgage to *C*, for a certain sum, *with notice of the first mortgage*, and then the first mortgagee, *having notice of the second mortgage*, lent a farther sum. Lord *Cowper* decreed that the second mortgagee should not redeem the first mortgagee, without paying as well the money lent after, as that lent before the second mortgage was made; for it was the folly of the second mortgagee, *with notice*, to take such security.

But, here we must particularly attend to the distinction between notice previous to the time of the lending the money by the *puiſne* mortgagee, and at the time of purchasing in the elder incumbrance; for, a mortgagee *puiſne* will be protected, although he had actual notice of a second incumbrance at the time of purchasing in the *prior security* to cover his own, because that is the very occasion that shows the necessity of so doing.

1 Vern. 188.
2 Vent. 339.
2 Vez. 574.

This rule however hath its exceptions; for, a purchaser or mortgagee shall not protect himself by taking a conveyance from a trustee, if he hath notice of the trust at the time of getting it in. And therefore

Pye v. George,
Salk. 680.
Rep. temp.
Talbot. 260.
Saunders v. Dehew,
2 Vern. 271.
et vid.

Shields v.
Atkins,
3 Atk. 560.
1 Atk. 475.

fore where *B*, being possessed of a term for years, had made a voluntary settlement thereof in trust for herself for life, remainder to *I*, her daughter, for life, remainder to the children of her daughter by her then husband; and *I*, afterwards mortgaged the lands in question to *S*, who pretended he had no notice of the settlement; *I*, in the mortgage-deed, being called the daughter and heir of *B*, but that afterwards, hearing of it, he got an assignment of the term from the trustees. The Court resolved that, although a purchaser might buy in an incumbrance, or lay hold of any plank to defend himself, yet he should not be protected by taking a conveyance from a trustee, after he had notice of the trust; for, in that case, he himself *became the trustee*, and must not, to save himself, be guilty of a breach of trust,

Cited,
Bovey v.
Smith,
1 Vern. 149.
2 Ch. Ca.
125.
2 Vern. 194.
1 Atk. 475.

Even a fine levied by a purchaser, for full consideration, *with notice of a trust*, to strengthen his estate, will not bind the *cestui que trust*, although there be five years non-claim; for he, having purchased with notice, is but a trustee, notwithstanding any consideration paid by him; and the estate not being displaced, the fine cannot bar; but a fine and non-claim will be
a bar

a bar in equity, if a purchaser hath not notice.

And where the plaintiff's bill was to be relieved upon a trust, and charged the defendant with notice thereof, and that he had procured a conveyance of the lands upon which the trust was had, *and that at or before his taking the said conveyance*, he had notice of the said trust for the plaintiff; the defendant, by way of answer, denied that he had any notice of the trust *at the time of his purchase or contract*, and pleaded that he was a purchaser for a valuable consideration. And it was insisted that the point of notice was not well answered, in that the defendant denied notice *at the time of the purchase only*; for, the word *purchase* might be understood to mean the time when the contract for the purchase was made, and it might be, he had no notice then, and might have notice after, before, or at sealing of the conveyance; and if there was any notice before the conveyance to him was executed, that would charge the defendant; upon which objection the plea was over-ruled,

More v. May-
how, 1 Ch. Ca.
34. Attorney
General v.
Gower et al'.
2 E. Ca. Abr.
685. II. et
Wigg v. Wigg,
1 Atk. 384.

But here we must observe, that, if *cestui que trust*, tenant in tail, be the mortgagor,
and

Elie v. Of-
borne, 2 Vern.
754. 1 Eq. Ca.
Abr. 385. 3.

and join with the trustees in making the conveyance, it will be good and valid; they being considered as trustees purely for the tenant in tail to preserve his estate *only*, and not to stand in opposition to him, for the sake of those who are to come after him.

2 Vez. 477.
2 Ch. Ca. 48.

So, if the *eigne* incumbrance be purchased in, after a decree *in rem*, by a creditor party to that decree, it will not protect him, although he had not notice of any prior incumbrance at the time he lent his money, as, in this case, notice or not is immaterial; for the decree binds the purchaser, and the vendor can give no title, when the right to the land is adjudged to another, and the party who gained the suit, hath a title, by the decree, to carry it into execution on the land, into whose-ever hands it may afterwards come.

Wortley v.
Birkhead,
2 Vez. 571.
6c. 3. Atk. 809.
2 Vern. 525.

Thus, in the case of *Wortley v. Birkhead*, where the plaintiff (after a decree had been made in 1748, in a cause wherein the plaintiff and defendants, among other creditors, were plaintiffs, for the sale of the estate of *A*, whereby the Master had been directed to enquire into the priority of their demands)

bought

bought in a judgment given in 1694, and made claim before the Master, to have it tacked to his mortgage and thereby to be paid before the defendants; as to which the Master refused to make any report: whereupon the plaintiff filed his bill, and one question was, whether he could tack the incumbrance bought in after the decree to his mortgage? Lord Chancellor *Hardwicke*, as to this part of the case, said, that there was no case wherein it had been determined that a *puisne* incumbrancer, a party in a cause, and a decree made, in that cause, for satisfaction of incumbrancers *according to their respective priorities*, having taken in a prior to tack to his *puisne* incumbrance, should be allowed to make use of it in any other shape, than that in which the original incumbrancer might use it, had no such purchase been made. He thought it would be most mischievous and pernicious, if the Court should allow the doctrine of tacking to be carried to that extent; first, taking it upon the terms of the decree; all those decrees, where there were several incumbrances before the Court, a sale directed, and every thing necessary to clear the estate, in order to that sale, proceeded on the foundation, *that the rights of the parties* were to be taken as they stood at the time of the decree; and therefore they directed

rected an enquiry into the priorities. What then were those priorities? Why such as they stood at the time of the decree: not that afterwards, the priority should be varied. The sense, reason, and justice of the case required it should be so; for otherwise, if (where an incumbrancer, or an estate which was affected with several charges, brought a bill for satisfaction thereof, and there were all proper parties and a decree for it, as between himself and the owner of the equity of redemption, some of the incumbrances being prior, others posterior to his) one of those defendants, who happened to be prior to him, was allowed to convey to another defendant, who was *puisne* to him, it would shut out the plaintiff after the decree made, at which time the rights were considered. What would be the consequence? Nothing could lay a foundation for greater collusion and contrivance, between the parties, to exclude each other, than such a liberty would, and that to the great deceit of the plaintiff; for then a man would lose his costs by such a proceeding, although he had a right to his debt, principal, interest, and costs, according to the respective priorities; that was the direction of this decree: and there was a sufficient fund according to the then right of the plaintiff, to pay all that was due;

due; but if this were permitted, after a decree was made, two of these defendants might, by a collusion, give a third incumbrancer more than his debt, and it would be worth while to do so, in order to exclude another, who happened to be a second incumbrancer. It would be carrying securities to market in that manner, whereby the purchaser of them should not only stand in the place of the party selling, but would acquire a new equity, which it would be mischievous to allow; and therefore his Lordship said, he never was clearer in opinion than upon this part of the case, as to the general right.

So, where *S*, a *puisne* incumbrancer, after the bill brought, and after the first decree made, and, in truth, after the report, got an assignment of an old judgment and mortgage, expecting thereby to gain a preference to his debt; the Court held, that the assignment obtained by him being after the decree made, he should not profit by it or change the order of payment, but should come in according to the time of his own incumbrance, without regard to the old judgment and mortgage.

*Bristol et al.
v. Hungerford
et al. 2 Vern.
524. 5.*

And

2 Vez. 575.

And the law is the same as to purchasers, incumbrancers who are not parties in the suit, *but who could come in under the decree*; for they must come in upon, and submit to, the terms of that decree, though no parties.

But a third mortgagee may purchase in a first mortgage, and defend himself thereby, notwithstanding a suit be depending between the respective mortgagees.

Robinson v.
Davison *et al.*
1 Brow. Cha.
Rep. 63. S. L.
Turner v.
Richmond,
Supra, 81.

Thus, where the second mortgagee filed his bill against the mortgagor, first and third mortgagees to be let in to pay off the first mortgage, and that then the estate should be sold, his own mortgage paid, and the third be satisfied out of the remainder; and pending the suit the third mortgagee bought in the first mortgage: it was determined that by this he had gained a priority, and should be paid his whole money before the second mortgagee.

Vid. Worlesley
v. Earl of
Scarborough,
3 Atk. 392.

However, in many cases a suit pending in equity against land, is a bar to alienation; for *pendente lite nihil innovetur*: therefore the vendor of lands, pending a suit in equity against them, can give no title but what will be subject to its issue; but it is the pendency
of

of the suit that creates the notice, for as it is a transaction in a sovereign Court of Justice, it is supposed all people are attentive to what passes there; and to prevent a greater mischief that would arise by people's purchasing a right under litigation and then in contest.

¶ *F* having only one daughter, and desiring to keep part of his estate in his name, by will, made in 1684, devised a messuage to *F*, his near kinsman, in tail male, with remainder over, and gave his lands in *Sussex* to his daughter, who married *E*; they, with *C*, were supposed to have destroyed the will after the death of the testator. *F* brought his bill against *D* and his wife; and, in 1687, obtained a decree to hold and enjoy the lands according to the will against them, and all claiming under them. The estate, devised to *F*, having been mortgaged by the testator prior to his will to *B* for 100*l*. *N* pending the suit, bought in *B*'s mortgage, and purchased the equity of redemption from *D* and his wife. *N* was served with the former decree, and appeared, and was examined, and set out his title under this mortgage, whereupon *F* was put to bring his bill to redeem. *N*, by answer, alledged, that although he had been informed before his purchase that it was

Finch v. Newnham,
2 Vern. 217. et
vid. *Fleming v. Page*,
Finch 320. et
vid. *Herbert's*
case, this doctrine of notice
extended to a
criminal case.
3 P. Will. 116.

pretended there had been such will made, yet, upon enquiry, he had been assured and satisfied that it was destroyed by the testator in his life-time, and therefore he proceeded in his purchase, and insisted, that the former decree, to which he was no party, was unjust in decreeing the lands to be enjoyed according to the will; but, in regard he purchased *pendente lite*, and with notice that there was a will, the Court would not admit him to examine the justice of the former decree, or to try at law whether such will was cancelled or destroyed by the testator, but declared he should be bound by the former proceedings, and decreed the redemption of the mortgage to the plaintiff.

And where it is only a decree to account, and not such a one as puts a conclusion to the matter in question, that is still such a suit, as affects people with notice of what is doing.

But no case has gone so far, and it would be very inconvenient, if where money is secured upon an estate, and there is a question depending in Chancery upon the right of or about the money, but no question relating to the estate upon which it is secured, but it is wholly a collateral matter, as to say that a pur-

chaser of the estate pending, that suit should be affected with notice by such implication as the law creates by the pendency of the suit.

Thus, where *A* and *B* were partners, *A* died having made his will, and devised to his executors and their heirs, "all his real
 " and personal estate, not by his will otherwise disposed of, in trust that they should,
 " by charging, leasing, or selling his estates,
 " or any of them, raise money for the payment of all his debts; and what should remain, he directed to be divided into equal
 " portions, share and share alike, between
 " his five children, and left it to his executors to make proper allowances for their
 " maintenance, until there should be a distribution made of his estates." *A*, amongst other things, had a mortgage of 3500*l*. In a cause between the executor of *B*, and *A*'s executors, the mortgage deed was directed to be left in the hands of a Master in Chancery, till the partnership account should be finally adjusted. Afterwards *A*'s executors conveyed the mortgage to Master *Bennet*, as a security for one of the executors, on his appointment to be receiver of another person's estate. And one argument used by the children of *A*, in a suit against the holders of the mortgage, by way of security for the

Mead v. Lord Orrery, 3 Atk. 236, et S. L. ibid. 394.

due discharge of the receivership, was, that there was a suit at the time of the assignment about the mortgage, who was entitled to it, and that therefore it was void, as being made *lite pendente*. But Lord Hardwicke said, that he did not see how this *lis pendens* could affect this assignment, unless it had been determined that this was the mortgage of *B*, the partner of *A*, and belonged to his creditors, who were the plaintiffs in that cause. But that as it was therein determined to be *A*'s estate, there was an end of that objection.

But, in case of a real purchaser for a valuable consideration, *pendente lite*, the plaintiff will be held to strict proof of his own title.

Sorrel v.
Carpenter,
2 Will. Rep.
482.

Thus, where a bill was brought by *S* against *C*, to have the benefit of a decree, obtained against *L*, for the recovery of a leasehold estate held of the dean and chapter of *Saint Paul's*; *C* being a purchaser of this estate from *L*, *pendente lite*, but, as was proved, for the full value, and without any notice of *S*'s claim, or any actual notice of the suit: for the plaintiff it was insisted, that this purchase, made *pendente lite*, was to be considered as made under an implied and

and constructive notice; but the Court said, that although, where there was a conveyance made, *pendente lite*, without any valuable consideration, and to avoid and elude a decree, it ought to be highly discountenanced; and, though the alienation were for ever so good a consideration, the purchase, if made *pendente lite*, was nevertheless to be set aside, yet, where there was a real and fair purchaser, without notice, it was a very hard case, especially in a court of equity; and, there being some defect in part of the proof in deraigning the title of S, leave to amend, or make any new proof, after publication was refused, and the bill dismissed.

In this case, the Chancellor observed, that it was a difficult matter to search for bills in equity, or to get notice of them; many such being, after filing, kept in the Six Clerks desk; and that though the Court would oblige all persons to take notice of its decrees as much as of judgments at law, yet there did not seem to be the same reason for obliging people to take notice of the filing of a bill.

Sorrell v.
Carpenter,
2 Will. Rep.
482,
et vid.
3 Atk. 243.

And if a purchase or mortgage be made, pending a bill, to perpetuate the testimony

of witnesses to a will of land, the proceedings may be read against a purchaser or mortgagee, during the suit, although he hath not notice either express or implied.

This rule is founded upon the necessity of the case; for if depositions, taken in such a suit, could not be read against a purchaser under the heir at law or devisee, it would be in their power to prevent such a bill from being of any effect. For instance; suppose an heir at law (having got into the possession of an estate on the death of his ancestor, and the devisee, being out of possession, brought a bill to perpetuate testimony, and to prove the will) pending the suit, made a secret conveyance to another person; if the depositions taken in the cause could not be read against the person who claimed under the heir at law, the whole object of the suit would be defeated.

The case would be just the same, in respect to its consequences, if a devisee, having got into possession, the heir brought a bill of this sort, and afterwards the devisee made a private conveyance: if the heir at law could not read the depositions which were taken in that cause against a party claiming under him, the bringing the bill would be of no manner of effect.

Accor-

Accordingly, in a case where *J* made her will, and thereby devised all her real and personal estate to *C* and *N* in trust, that they should sell the same in order to discharge her debts and legacies; and that the surplus should be distributed into three equal shares, one share whereof was to go to *C*, another share to *K*, and a third to *T*. Soon after the making the will, *J* died, leaving *G* her heir at law: *K* and *T* were Papists, but *C* was a Protestant. In *April* 1736, *T* mortgaged her interest in this estate to *W* for 108*l*. In *May* 1736, a bill was brought by *C*, *K*, and *T*, against *G*, the heir at law, in order to perpetuate the testimony of the plaintiffs witnesses, and to prove the will of *J*. On the 3d of *January* 1737, *W* purchased of *T* her equity of redemption in this estate for 1000*l*. On the 8th of *January* following, *G* put in his answer to the bill, insisting thereby, among other things, that *K* and *T* were Papists, and consequently incapable by the statute of 11 *Will.* 3, to take by the will of *J*.

Garth v.
Crawford,
Barnardiston
Rep. 450.
Sc. By name
of Garth v.
Ward,
2 Atk. 175.

In that cause, *G* examined several witnesses, to shew that *K* and *T* were Papists.

A bill was then brought by *G* against *C*, *K*, and *T*, and likewise against *W*, in

G g 3

order

order to set aside the will of *Y*, with regard to two thirds of her real estate, which was to be sold, and the money arising from the sale to be paid to *K* and *T*, and likewise, that *K*, *T*, and *W*, might account for the profits of those shares. After the answers to this bill were come in, an order was obtained, that the depositions in the former cause might be read in the present one, saving just exceptions; but, on offering them to be read, it was objected on the part of *W*, that they could not be read as against him, he being no party to the former suit, his mortgage being made before the filing of that bill, and his purchase of the equity of redemption having been before the answer of *G* came in.

But the Lord Chancellor was of opinion, that these depositions ought to be read; and his Lordship distinguished between the mortgage to *W*, and his purchase of the equity of redemption; for, as to the mortgage, which was stated to have been made before the filing of that bill, his Lordship was of opinion that none of the depositions taken in that cause, could any ways be read to affect that; but, with regard to the purchase of the equity of redemption, which was made subsequent to the filing the bill, they

they ought to be read; and his Lordship said, that the answer not coming in until after the equity of redemption purchased, made no difference, for it very often happened by the ordinary indulgences which were given to the putting in of answers, that an answer did not come in to a bill until long after it was filed.

But, in general, a bill that cannot be brought to a hearing, cannot properly create a *lis pendens*, so as to affect a purchaser, claiming under one of the parties, after filing of the bill.

Barnard. Rep.
454.
Sc. 2 E. Ca.
Abr, 687. 13.

And it seems, that a decree in a court of equity, for money, does not bind a purchaser for a valuable consideration, without notice thereof, any more than a judgment at law; for a decree is not of superior force to a judgment; nay, its effect is inferior; and where it is said a decree is equal to a judgment, or to be paid equally therewith, this must be intended only out of the personal estate, for a decree for a debt does not bind the real estate, it acting only in *personam*, not in *rem*; and the remedy upon a decree to affect the land, is only for a contempt, whereupon the party proceeds to a sequestration, and that is but a personal process,

Searle v.
Lund,
2 Vern. 88.
1 Eq. Abr.
332, 4.
2 Ch. Ca. 48.
Et vid.
3 Will. 401.
et Ca. temp.
Talbot 217.
2 P. Will. 622.
1 Vez. 496.

as appears by its falling and abating by the death of the party.

A bill of discovery depending will not prevent *even* a party to the suit, from securing himself, by purchasing in an incumbrance prior to his own.

Hawkins v.
Taylor *et al*^p
2 Vern. 29.

Thus where *L*, the defendant in the cause, having an incumbrance on the lands in question, subsequent to the plaintiffs, and the bill being against him and other incumbrancers to discover their incumbrances purchased of *W*, who was a defendant, had the first incumbrance, and had assigned to *L* *pendente lite*; the question at the hearing was, whether the defendant *L*, who had a mortgage subsequent to the plaintiffs, should help himself against him by buying in *W*'s incumbrance that was prior to both? It was resolved he might lawfully do so: and the plaintiffs bill was dismissed without costs.

Greswold v.
Marlham,
supra 117.

Again, if a mortgagee, having had notice of incumbrances, and having been tendered his money, afterwards procures a decree to foreclose, and then purchases the equity of redemption, such incumbrances will not be affected by the decree.

If

If a mortgage be made, and afterwards
 a commission of bankruptcy be taken
 out against the mortgagor, and the com-
 missioners *make an assignment* of the estate;
 and then money be lent to the mortgagor
 on a second mortgage, the mortgagee *having*
no actual notice of the commission, in such
 case, although the *puisne* mortgagee purchase
 in the first security, yet it will not protect
 the mortgage subsequent to the commission
 of bankruptcy. The reason for which I ap-
 prehend, is, that a commission of bank-
 ruptcy is an act of public notoriety, by
 which all men are bound, on the ground of
 presumed notice.

Hitchcock v.
 Sedgwick,
 2 Vern. 156.
 Ca. temp.
 Talb. 70.

And indeed it seems as reasonable, that a
 purchaser should be denied the benefit of
 protecting himself by the purchase of a
 prior incumbrance, after a commission of
 bankruptcy sued out, and before the assign-
 ment of the effects, as after a decree; for
 a commission of bankruptcy is a public act
 of the Court, and operates as a decree *in rem*;
 in which respect it differs from a decree
 for money, or a judgment on a personal
 action, and, though an *ex parte* proceeding
 at first, yet, if it be not afterwards superseded,
 the property of the bankrupt is thereby
 determined to belong to his creditors in an
 equal

equal proportion, according to their several demands; and it differs from an act of bankruptcy, which is of so secret a nature, that it is impossible to be known, and has no visible operation until coupled with a commission.

3 Will. 244.
in Notes.

In all cases of a plea of a purchase or marriage settlement, notice must be denied, though not charged by the bill; and it will be sufficient to deny it, either by the plea or answer, notwithstanding the objection that it ought to be in the plea, since all the defendant has to do, is to prove his plea; for he is not to prove a negative, *viz.* that he had no notice. However, it seems best to deny notice, both in plea and answer.

Sel. Ca. Chan.
51.

Cason *et al.*?
v. Round
et al.
Prec. Ch.
226.

2 Vent. 361.
2 Vez. 450.
2 Ch. Ca. 73.

Notice, if charged, must be positively denied in the answer; for, if it be only evasively denied, the Court will decree a redemption on payment of the money only which was originally lent.

Jones *v.*
Thomas,
3 Will. 243.
Vid. *infra*,
Kelfal *v.*
Bennet.

But, in general, in a plea of a purchase, it is sufficient denial of notice to say, that at the time of the purchase he had no notice, without saying, or at any time before; for, notice before, is notice at the time of the

the purchase, and the party will, in such case, on its being made appear that he had notice before, be liable to be convicted of perjury.

If a purchaser has notice before the execution of the conveyance, it will bind him, although he had no notice before he had paid his money ; for it is all but one transaction.

Wigg v.
Wigg, 1 Atk.
382.

It is a rule of the Court of Chancery, where the plaintiff charges not only notice in general, but also special facts and circumstances, *that they* must be denied, as well as notice in general.

Senhouse v.
Earle,
2 Vez. 450.

If notice be denied by the answer, and proved by one witness only, this is not sufficient to decree upon, and the bill must be dismissed.

1 Vez. 66.
Kingdome v.
Boakes,
Prec. Ch. 19.

But this rule admits of several distinctions, *Ibid.* as, although, where the defendant's answer is a *clear* denial of a fact, which is proved only by one witness, the Court will not decree against the answer ; yet, where it is not a *positive* denial of the *same fact*, but admits of a difference (as, where it is only a denial with respect to the defendant himself, and *admits the fact as to another*, which will
equally

equally affect the defendant) the Court, on the evidence of one undoubted witness, will decree against the answer. Thus, where one *only* denies personal notice, which is a negative pregnant, that still there *may be notice to his agent*, which is a fact equally material, the answer will not be good.

Arnot v.
Biscoe,
1 Vez. 95.
Sed quare.

So, if the answer be not *ad idem*, as if the charge be positive, and the answer only *to belief*, that not being sufficient to contradict what is *positively* sworn, the rule does not apply.

Sir T. Janfen
v. Rany,
2 Atk. 141.
Walton v.
Hobbs,
2 Atk. 19.

And, where there are a great many concurring circumstances that strengthen and support the deposition of the witness, such case does not come within the before-mentioned rule; for the oath of a man, with *circumstances* corroborating it, is better than that of a man whose testimony is not so supported.

Arnot v.
Biscoe,
1 Vez. 97.
Pember v.
Mathers,
Brown's Rep.
Ch. 52.

And if, upon the whole, the evidence is not sufficiently clear, whereupon to make a decree, it may be sent to law to be tried upon an issue, in which the circumstances may be investigated by the jury. But where the defendant in express terms negatives the allegations of the bill, and the evidence is
only

only one person affirming what has been so negatived, and there are no corroborating circumstances, then the court will neither make a decree, nor send it to a trial at law.

On pleading, that the defendant is an incumbrancer for a valuable consideration without notice, it is sufficient to alledge, that the purchase of the prior incumbrance was made for a valuable consideration, without stating the particular sum.

1 Ch. Ca. 34.

C A P. XIII.

Of Notice express and implied,

NOTICE is of two kinds. First, actual notice, as where a man is party to a deed, or has notice of it regularly served upon him, or the like.

Wildgoose v.
Wayland,
Gouldsbo-
rough, 147,
case 67.

But the charge of *actual* notice must be founded upon something certain and circumstantial: Thus, where one came to a vendee, and said to him, "Take heed how you buy such land, for *A* hath nothing in that, except upon trust to the use of *B*;" and another came to the vendee and said to him, "It was not as he was informed, for *A* was seised of this land absolutely," by which the vendee bought the land; the question was, whether the first caveat given to the vendee was a sufficient notice of the trust or not?

The

The Lord Keeper said, that it was not; for flying reports were many times fables, and not truths; and if this should be admitted for a sufficient notice, then the inheritance of every man might easily be slandered.

Secondly, Presumptive notice, which is a *conclusion* of law (where, by the exercise of common diligence, without any extraordinary precaution, a man cannot but acquire a knowledge of a fact) that he hath notice thereof, although no *actual* proof of notice be exhibited against him.

Thus, where *A*, a copyholder in fee, mortgaged to *J* *S*, who was admitted by *B*, the steward of the manor; and afterwards *A* made a second mortgage to *C*, who was also admitted by *B*; and then a mortgage to *B*, who bought in *J* *S*'s security; it was decreed, that *B* should not postpone *C*; because it is presumed, from the mere act of admission, that a man of ordinary diligence and understanding, being steward of the manor, when *C* was admitted, must know, or have notice of the *mesne* mortgage to *C*.

Brothers v.
Bence,
Fitz. Gib.
Rep. 118.
2 E. Ca.
Abr. 615. 11.

Where a purchaser cannot make out a title, but by a *deed*, which leads him to a fact material to it; he will not be deemed a purchaser

2 Ch. Ca.
246.
Gilb. Rep.
Eq. 8.
1 Ch. Ca.
291.

Dunch v.
Kent,
1 Vern. 319.

chaser without notice of that fact, but will be presumed cognizant thereof; for it is deemed gross neglect, that he sought not after it.

Drapers
Company v.
Yardly et al'.
2 Vern. 602.

Thus, where *B* devised to *Y* in tail male, and if he died without issue male, to *X* in tail male, but subject to two legacies of 500*l.* and 1000*l.* to the Drapers Company; and *X* afterwards levied a fine to the use of him and his heirs (on which was five years non claim) and then granted a rent-charge of 100*l. per annum* to *S*, and mortgaged the premises to *L*; the Court held the fine and non-claim was no bar to the legatees; for *X* having no title, but under the will, it was implied notice to all purchasers under him.

Dunch v.
Kent, 1 Vern.
260, 319.

So, where an annuity was granted to *A* by the crown, by patent issuable out of the ex-cise upon special trust, that all such of the creditors of *B*, as would come in *within a twelve-month*, and accept a share of this annual sum proportionate to their debts, should have the same assigned to them; and *A*, after the year, assigned part thereof by instruments which purported to be in consideration of debts due and owing from *B*, but were in truth for *A*'s own debts, and the assignees

assignees had afterwards assigned the same over to others, who claimed, as purchasers, without notice, for full and valuable consideration. It was held, that although all the creditors of *A* did not come in within the year, yet this patent was in trust for them, and not convertible to other purposes; and that those who purchased of the assignees of *A*, came in under the Letters Patent, in which the trust was mentioned, and ought to have taken notice of it at their peril.

And subsequent purchasers also are taken to have notice of the contents of a deed or will, if they must claim under it.

As if *A* makes a conveyance to *B*, with power of revocation by will, and, afterwards, limits other uses; if *B* disposes thereof to a purchaser, a subsequent purchaser is intended to have notice of the will, as well as of the power to revoke; for no title can be made to a purchaser, but by the conveyance which contains the power of revocation.

Moore v. Bennet,
2 Ch. Ca.
246.

But in the case of *Bovey v. Smith*, a will was not suffered to be set up, as presumptive notice to defeat a transaction, by a trust therein contained, that had lain dormant for

Bovey v. Smith,
1 Vern. 84.
144.
Sc. 2 Ch.
Ca. 124.

many years, after a fine, and where there was *room to presume*, that other trusts were appointed. In that case, *B*, the mother of *A*, being in *Holland*, and having a separate estate, about forty years previous to the time of filing the bill, made her will in *Dutch*, and thereby devised houses to *W*, her husband's son by a former wife, and to other trustees, in trust *for her four daughters and their children, and such of their children as should be alive at the last*, and, afterwards, declared the trust of all her estate, thereby undisposed of, to be for her and her heirs.

Ibid.

The trustees, apprehending that the devise carried the inheritance of the houses to the daughters, sold such inheritance in 1652, for a good and valuable consideration, and distributed the money, arising from the sale, equally amongst them.

Ibid.

A was privy to this conveyance, and made no claim, nor pretended any right to the houses; a fine was levied of them, and five years afterwards *W*, the trustee, for a full consideration, purchased them back to himself and his heirs. Then *A* having taken advice on the will, and conceiving the daughters took only an estate for life, exhibited his bill against *S*, who now stood in
the

the place of *W*, the trustee, to have an execution of the trust, and the lands decreed to him. Two decrees had been for the plaintiff.

One point argued was, that it was impossible any one should come at the land without having notice of the trust, for they must purchase under the will; and all their title was by the will by which the trust was created, and every man that had notice of the will, must, at his peril, take notice of the operation and construction of the law upon it. But the Lord Keeper said, this was an application, after one and thirty years possession, to affect an estate with a trust, notwithstanding a release and fine, and *that*, upon a supposal that *B* had made no other appointment (as she had power to do by the deed) *and* which, after so long a possession, it ought rather to be presumed she had done; and also upon a supposal, that this was a true copy of the will. This was only a translation; the original was lost; the difference in point of translation between children and issue was nice, and the question was, who should suffer? For the defendant was a purchaser, and had paid a full consideration, and was here to be affected with a notional notice only; the plaintiff stood by all the while

and was silent, and, at best, passive in the breach of trust. That, therefore, though it was hard to dismiss the bill after two decrees for the plaintiff, yet his Lordship was not satisfied he could decree it for him, and the bill was dismissed.

1 Vez. 173.

So, likewise, this rule admits of an exception, in the case of an assignee of the estate of a testator, under an assignment made by the executor; for he will not, in favour of creditors or residuary legatees, be presumed to have notice of what is contained in the will of the deviser; because, whoever takes any thing from an executor, must always do it with notice of a will; and therefore, if this doctrine of the will being notice to the assignee was to prevail, no person would dare to purchase, or take an assignment from an executor. Besides, it would be unreasonable that a purchaser should take upon him to make out the account, as to the *quantum* of the debts or assets, when he is not entitled to have the vouchers for that purpose.

Mead v.
L. Orrery,
3 Atk. 236.
July 19, 1745.
Et vid. Ewer
v. Corbett,
2 Will. 148.

Thus where *M*, having a mortgage of 3500*l.* made his will in 1712, and devised all his real and personal estate, not by his will otherwise disposed of, to his executors in trust, in the first place by charging, leasing,

leasing, or selling thereof, or of any part thereof, to raise money to pay his debts; and then to divide what should remain, after payment thereof, in equal proportions between his five children, and appointed his wife, his eldest son *I M*, and another person, executors, and died, leaving his widow and five children; and, after payment of all *M*'s debts, a large surplus remained to be divided. *I M* having been appointed, in 1726, receiver of all the rents and profits of the real and personal estates of *E*, procured a deed to be made, to which the other executors were parties, reciting, that there was due on the mortgage 9000 *l*. and that the same was the proper money of *I M*, and assigning the mortgage and all due thereon to *B*, his heirs and assigns, with a proviso to be void, if *I M* faithfully accounted with *B* for what he should receive from the estate of *E*. *I M* afterwards died intestate, without accounting with *B*, and greatly indebted to the estate of *E*. A bill was then filed by the plaintiffs, two of the children of *M*, against the defendants, the representatives of *E*, to account for what they had received on the mortgage, and to deliver up the deeds and writings relative thereto; and one question was, whether the plaintiffs, as residuary legatees of *M*, were

Burting v.
Stonard,
ibid. 150.

entitled to be relieved against the assignment of the mortgage, and to have an account; or, whether the representatives of *E* were entitled to retain the assignment? And this turned upon the point, whether the assignees of the mortgage were to be considered as having notice of the trust for the benefit of younger children? And the Court held, the bare point of notice of the will, in this case, was not sufficient.

Nugent v.
Gifford.
1 Atk 463.
1738. Sc.
2 Vez. 269.
Ewer v. Cor-
bett, 2 P.
Will. 149.
Bustling v.
Stonard, 2 P.
Will. 150.

So, where an executor assigned over a mortgage term of his testator to *A*, as a satisfaction of a debt due to *A* from himself; it was objected, in favour of the daughters of the testator, who were creditors under a marriage settlement, that the assignees took this assignment with notice that it was the testamentary assets of the testator. But the Court held the alienation to be good.

But if such purchaser, from an executor, hath *express notice* of a debt due from the testator still unsatisfied, and there be a contrivance between him and the executor to defeat a just debt, such a transaction will be void against creditors, and the assignee will be held liable.

Thus,

Thus where *H*, being indebted to *C* on bond, died possessed of a great personal estate, and made *W* executor and devisee, who wasted the estate; *D* having notice of *C*'s debt, bought a leasehold estate of *W*, by discounting 200*l.* due from *H*, 550*l.* due from *W*, and by payment of 150*l.* in money: on a bill filed by *C* to have satisfaction for his debt out of the leasehold estate, being part of *H*'s assets, the question was, whether this was a good sale to bind a creditor? And it was held it was not, for *D* was a party consenting to, and contriving, a *devastavit*.

Crane v. Drake,
2 Vern. 616.
Note, Lord Hardwicke admitted the principle of this case, but doubted whether the facts warranted the application of it. Vid. 2 Vez. 469.

So, where the devisee of an estate, in trust for payment of debts, mortgaged the estates to one of the creditors, with notice; and the question was, whether such creditor should retain it by way of security for his own debt, as well for the old debt, as for the money lately advanced? The Chancellor was of opinion, that, though the general rule was, that a purchaser or mortgagee need not see to the application of the money, where there was no schedule of the debts, yet this rule was never carried so far, as to put it in the power of the devisee in trust, or of the heir at law, who in equity was considered as a trustee, to favour one creditor, which would

Ithell v. Beane.
1 Vez. 215.

be the consequence if this was allowed. Such creditor as to his old debt, could not be put into a better condition by taking the mortgage, but must come in, *pari passu*, with the rest of the creditors ; for the estate was a security in the hands of the trustee before, and such mortgage only operated to change the course, which the Court would not suffer the trustee to do, considering the giving preference to one creditor, as a fraud, which the Court would not allow.

If a deed, by which a prior charge is made upon an estate, be delivered, among other papers, relating to the title thereof, to an intended purchaser, he will be taken to have notice of the prior incumbrance ; it being necessarily presumed, that so material a circumstance could not escape his notice, or, if it did, it must be through gross neglect.

Ferrers v.
Cherry et al^s.
2 Vern. 384.

Thus, where the plaintiff's father and mother sold an estate to C and his heirs, which, pursuant to an agreement made on their marriage, had been settled on the plaintiff's father for life, part on the mother for her jointure, remainder of the whole on the first and other sons in tail male ; and the conveyance was made by deed and fine. C, upon his purchase, took in a mortgage-term, which
was

was prior to the settlement, entered and afterwards sold the estate to *H* and *I*. It appearing, by the proofs in the cause, that *C*, the first purchaser, *had notice of the settlement*, and that the same, amongst other writings, were delivered to him, the Court decreed, that *C* should account for the consideration money, for which he sold the estate, with interest from the decease of the plaintiff's father and mother thereout, discounting what was due on the mortgage made prior to the settlement.

And if it doth not appear, upon the face of such settlement, whether it be voluntary, or on articles before marriage, and, in consequence, whether to be considered as binding against creditors or not, that will not alter the case ; for the purchaser, having notice of the deed, must, at his peril, purchase, and be bound by the effect of it.

*Ferrers v.
Cherry et al.
2 Vern. 314.*

But, in the last case, the bill was dismissed as to *H* and *I*, who were made defendants, they having pleaded that they were purchasers without notice, and the plaintiff not being able to prove any notice against them, there being no foundation to presume knowledge of the settlement, *C* being able to make a good title without it.

The

The adherence to this rule of equity is so strict, that, although there be no positive notice contained in a deed, yet if there be words therein, from which the existence of a prior incumbrance must necessarily be implied, it will be sufficient to charge a purchaser.

Morrett v.
Paske,
2 Atk. 54.
Vid. 1 Atk.
490. 491.

Thus where a creditor by judgment, in 1698, for 600*l.* came to an account with the conusor in the year 1707, and settled the remainder due upon the judgment at 420*l.* and took a mortgage in fee for that sum, as a collateral security to the judgment; and one S, an attorney, in 1716, took an assignment of this mortgage, in which there was a recital, *that 90 l. of the consideration of the assignment, was then the full worth of the estate.* S was likewise in possession of another mortgage made in 1688, upon the same estate, as was subject to the judgment in 1698, and the mortgage in 1707. It was resolved S should not be allowed to tack the two mortgages together, so as to defeat intermediate incumbrances between the years 1688 and 1698; and yet the mortgage in 1707 should have relation back to the judgment in 1698, and by consolidating them together, should entitle S to receive the sum due upon that judgment, prior to
creditors

creditors after the year 1698; but, as to money reported due since the mortgage in 1707, it should be paid only in priority to creditors subsequent to 1707. One ground of which decision was, that the words in the recital of the assignment of the mortgage in 1716, *viz.* "that 90*l.* the consideration money, was the full worth of the estate *at that time,*" naturally implied, that there were intermediate incumbrances, and therefore, to give *S* the advantage of tacking both mortgages, would be contrary to his own intention; for, at the time he took the assignment of this *puiſne* incumbrance, he must know the estate was worth no more from the very words of the recital.

So where *I C*, being seised of several freehold estates, had settled the same to certain uses, and being possessed of a prebendary lease for twenty-one years, which was usually renewed every seven years, and which he held at the time of making his will, after charging the same, together with other freehold estates, with an annuity, devised it to the same uses, intents, and purposes, as were declared in the settlement of the freehold estates first mentioned. Then the testator died. The leasehold estate was several times renewed by the several persons in possession, and

Coppin *v.*
Femyhough,
Bro. Rep,
Chan. 291.

and in one of the renewals, the then lessee was stiled devisee of *I C.* Afterwards there were several other renewals. Then the estate was mortgaged by one of the claimants, under the settlement and will as his own property. And the question was, whether the mortgagee, who had no other notice of any defect in his title except that the lease, which was assigned to him, recited among the considerations, the surrender of the former lease, which recited the surrender of the other, in which the lessee for the time being was stiled devisee of *I C.*, had such notice thereby, as would render the estates in his hands liable to the trusts of the settlement. And it was held that the mortgagee was affected with notice of the settlement, and that he must convey the estate according to the uses, &c. limited and declared therein.

But a suspicion from deeds, in which a prior incumbrance is recited, being in the hands of a family, is not sufficient evidence of notice to affect them, if they claim under a settlement, which might be made by an apparent owner, without looking into the deeds; for in such case something farther must be shewn.

Whitfield v.
Fausset,
1 Vez. 387.

So, where there were father, mother, and son, and the father settled an estate on himself

self for life, then to his wife for her jointure, and on her death, to the sons of the marriage; under which settlement, the wife and son insisted on being purchasers for a valuable consideration, without notice. Notice of a prior charge was proved against the father, by recitals on his own conveyances, and in part by his own admission; but, as to the wife and son, there was no proof, but from these deeds being in the hands of the family, which was held not sufficient to affect them with notice; because such settlement might have been made by an apparent owner without the deeds having been looked into.

And whatever is sufficient to put the party charged with notice upon an enquiry, is good notice in equity: thus, where infants, entitled to an estate, found a person in possession thereof then, and received rent of him for ten years after they came of age, that was held to be a sufficient notice of a lease made by their guardians, and a ground from whence to conclude that they had ratified it; for, finding a person upon their estate, was sufficient to put them upon enquiry.

Smith v.
Low,
1 Atk. 490.

• So, where a defendant claims under a conveyance made by a remainder man, where

Kelfal v.
Bennet,
1 Atk. 522.

where there is an estate tail prior to the estate of him under whom he purchased, it is incumbent on him to see if that estate be spent; for, if it be not, he will be considered as having notice thereof. And it will not be a sufficient denial for the purchaser to plead, that at the time of the purchase, the vendor made affidavit that tenant in tail was dead without issue, and *therefore* that he is a purchaser without notice; for, this is a denial only of the knowledge of there being a tenant *in esse*, not of knowledge of *his* title, which a purchaser is bound to take notice of.

Brown Cha.
Ca. 302.
per Comm.

But if, *from recital*, a title to lands be deduced by the *first* vendor, *that* will not be *sufficient*, if such estate be not paid for, to affect a subsequent purchaser for a valuable consideration with notice thereof; for *that* does not shew that it was not paid for, or lead to an enquiry whether it was paid for or not.

2 Vez. 486.

If a deed, or other paper which is deemed constructive notice of a prior incumbrance, be found in the custody of any one, it will be no objection to the charge of notice, that it does not appear when it came there; for if a person admits, or a deed be proved to be

be in his custody, whether as representative of another or otherwise, it will be incumbent upon *him* to shew when it came there, for it is impossible for the other side to shew it.

And the fact of presumptive notice, founded upon the party having had a deed, whereby a title in another, elder than his own, is created, in his possession, may be controled, by shewing that although the party had notice of the deed, yet he was not aware of its effect, but was induced, upon investigation of lawyers, to draw a different conclusion on the effect of the instrument from that which in reality it produced.

Thus where tenant for life, remainder to his first son, mortgaged for 1500*l.* and the deed of settlement was produced and seen by the purchaser, who lent the money notwithstanding; being advised that the tenant for life, not having then any son born, could destroy the contingent remainders, though, in truth, there was a son born five days before the lending of the money, yet the mortgagee having had no notice thereof, and having got the deed of settlement, the Court would not relieve against him by compelling him to produce it.

Brampton *v.*
Barker,
2 Vern 159,
1 E. Ca. Abr.
333, 3.

**Merry v.
Abney,**

1 Ch. Ca. 38.

1 Vez. 69.

2 Vez. 477.

**3 Ch. Ca. 110.
Nelson Rep.**

59-

Maddox v.

Maddox,

1 Vez. 61.

Notice to a man's scrivener, attorney, agent or counsel, is sufficient notice to the party himself.

Ashley v. Bailie, 2 Vez. 368. Hothwall v. Abney,

And therefore, where *M* suffered a recovery of an estate in *A*, and then settled all his lands in *A* upon his family; afterwards a tenement in *A*, of which he had the reversion after an estate for life, descending to him in tail by the death of the tenant for life, he suffered a recovery of it, and devised it to his younger son in fee. Then *M* mortgaged it, together with 200*l.* that he had a power to charge on the settled estate, for securing 200*l.* which he borrowed, and then he died. The mortgagee applied to the elder son for the money, who at first disputed the payment, but afterwards submitted thereto, upon the mortgagee's assigning to him the tenement so charged, that he might stand in the mortgagee's place; to which the mortgagee agreed, upon his covenanting to indemnify him for making this assignment, he having heard of the younger son's title. The eldest son then mortgaged the tenement to *B*, who had advanced the money to pay off the former mortgage. It was sworn, that *B*'s agent was present at the execution of the assignment

when

when the indemnity was insisted upon; and the agent deposed, that the deeds were laid before counsel, who made objections about the plaintiff's title. The assignment itself was strong evidence of notice, for it had not the face of an assignment to a person having the equity of redemption, but was made subject to the equity of redemption; and was plainly meant to keep the mortgage on foot, if any other person had the equity of redemption, as the covenant to indemnify also supposed. One ^a Vez. 485; question was, whether the last mortgagee had not notice of the youngest son's title? And the Court held, here was such evidence of general notice, either to the party himself, *or to his agent*, to take care, as made it necessary for him to enquire into the title, which not having done, he must take the consequence.

So, where *E* mortgaged his manor of *B* ^{Brotherton v. Hatt et al.} to *M*, and his heirs, for securing 3000 *l.*; ^{2 Vern. 574.} afterwards *G*, the father of the plaintiff *B*, lent *E* 2800 *l.* and, by deed, reciting *M*'s mortgage, he declared, that after the 3000 *l.* and interest paid, the estate should stand charged, and be a security for *G*'s money. *M* was no party to this deed. Afterwards *H*, one of the defendants, lent *E* 400 *l.* and

obtained a deed from *E* and *M*, that after *M* was paid, the estate should, in the next place, stand charged with the 400*l.* and in like manner for *C*, and several other defendants. All the securities were transacted at the shop of *W* and *Y*, scriveners, who were witnesses, engrossed the writings, and were in the nature of agents to all the several lenders. The question was, whether *B* should be paid next after *M*, or whether *H* and the others should be preferred, because they had got a declaration both from *E* and *M*, who, by that means, became a trustee for them, after his own money paid? And it was decreed, that *B* should be paid next to *M*, and so on, as the mortgagees stood in order of time; for notice to the agent was good notice to the party, and consequently, those that lent last, must come last, having notice of what was before lent.

3 Atk. 37.

And although a country attorney acts by an agent in causes in *London*, yet he will be considered as the solicitor for his clients, though he resides in the country, and what is known to him, will be constructive notice to them.

And the law will be the same, though one person be agent for both parties, nor is it

it material, on whose recommendation or advice the agent was employed. For, where a woman pleaded that the agent, who made her marriage settlement, was not employed for her but as an attorney for her intended husband, admitting that he might prepare the articles, she having a confidence in him from her husband's recommendation; so that her general denial was to be taken with this admission, which left it open to the proof of notice to her agent, although personal notice was denied; it was objected, that notice to her husband's attorney or agent would not affect her; but it was held, that she had sufficiently admitted that he was agent or attorney for her, by her consenting to his preparing articles, from a confidence in her husband; and that it was no matter what ground she went upon, or upon whose recommendation or advice, it being the same thing to the plaintiffs; for it would be very inconvenient and mischievous to take into consideration from whence an agency arose. Nor was it material, that the husband also employed him, there being several cases where, in marriage settlements, the same counsel or attorney was employed on both sides, who would be both affected with notice to him, it being the same to a person having an equity.

Le Neve v:
Le Neve,
i Vez!

The same principle was laid down by Lord *Northington* in the case of *Sheldon* against *Cox*, and others.

Sheldon v.
Cox, et al.
Amb. Rep.
624, et vid.
Doe on Dem.
of Willis et al.
v. Martin,
Mich. Term,
31 Geo. 3. 39.

In this case *A* and *B* were impowered by act of parliament, to purchase estates in a certain district to enable them to build a square, *C* (who was a barrister at law, and who appeared to have taken the management of the affair upon himself) purchased a parcel of ground held on a church lease, and borrowed 3500*l.* of *D*, and gave him a declaration of trust of the leasehold estates as a security, and delivered him the renewed leases: *C* afterwards built several houses, some of which were erected upon the ground on which *D* had his security, and then *C* granted a lease of these houses to *H*, reserving a ground rent; which was done for the purpose of establishing a rent; and *H* declared himself in writing to be only a trustee for *C*. Afterwards *H* assigned some of the houses in *D*'s security to *M*, for securing a sum of money by him lent, and then he assigned all the houses to *E* likewise, for securing a farther loan. Neither *M* nor *E* had actual personal notice of the mortgage to *D*, nor of each other's mortgage; but both *M* and *E* employed *C* as their council and agent in these transactions, and nobody else. On a bill
filed

filed by *D* for a sale of the estates, and to be paid his mortgage money In the first place, one question was, whether *M* and *E* were to be affected by the notice to *C*, their agent, of *D*'s security; *et per Curiam*, it is a fixed and settled point, that notice to the agent is notice to the principal. *C*'s acting in different capacities makes no difference. It is the same as they had been in different persons.

If one purchases in the name of another person, without any authority from him so to do, and he not having notice of this intention; yet, if he afterwards *agrees to it*, he makes the former his agent *ab initio*.

Thus where *G*, in 1699, lent *W* 200*l*. upon a surrender of copyhold lands, but neglected to get the surrender presented at the next court day as he ought to have done, for want of which the surrender was void, according to the custom of the manor.

In 1703, *B* agreed with *W* to purchase the mortgaged premises for 400*l*. and took a surrender in the name of *M*, who afterwards consented to become the purchaser, and paid the money. It was proved, that *B*, whilst he was treating with *W*, had notice of the former incumbrance, and therefore de-

Jennings v.
Moore et al.
2 Vern. 602.
Sc. 1 Brown's
Parl. Ca. 244.
et vid. Mer-
ry v. Abney,
1 Ch. Ca. 38.

clined to purchase in his own name, and took the surrender in the name of *M*, and procured him to become a purchaser, that *B* might be paid a debt, which *W* owed him, out of the consideration-money.

Ibid.

On a bill filed by the executor of *G*, *M* pleaded himself to be a purchaser without notice of the plaintiff's demand; and that his surrender was presented, and he admitted tenant, without notice of *G*'s surrender, which was kept in his pocket, and not presented till long after his purchase, surrender, admittance, and payment of his consideration-money. But it was adjudged at the Rolls, that notice to *B* was sufficient to affect *M*; for, though he did not employ *B* to purchase for him, or knew any thing of it until after *B* had agreed and taken the surrender in his name, yet he, by approving of it afterwards, had made *B* his agent *ab initio*; and *M* was decreed to pay the 400 *l.* and interest, or to surrender to the executor of *G*.

Case of Lord
Falconbridge,
cited 2 Vez.
369. Ibid.
370. Sc.
Fitzgib. 211.
at Worsley v.

But, examining a title in *one* transaction, in the ordinary course of business, which cannot be supposed to make any impression, as to any future event, will not operate as constructive notice to an agent in general,
or

or counsel, or attorney, to affect his client on a *subsequent* transaction, and in another business at a distant period; for, an agent or counsel cannot be supposed to remember every particular circumstance, contained in deeds or papers that come under his perusal.

Earl of Scarborough.
3 Atk. 392.

And Lord *Hardwicke*, in the case of *Warwick* and *Warwick*, expressed his approbation of the rule laid down in the case of *Fitzgerald* and *Falconbridge*, above-mentioned, that notice should be in the same transaction, and his Lordship said, that it should be adhered to, otherwise it would make purchasers and mortgagees titles depend altogether on the memory of their counsellors and agents, and oblige them to apply to persons of less eminence as counsel, as not being so likely to have notice of former transactions. And in the principal case, it was held that notice, arising from a case (stated by one who was an agent for both parties in a subsequent mortgage) stated in order to do something towards suffering a common recovery, a year and six months before the party was to be affected with this notice, was not sufficient to affect a purchaser. However, there were other circumstances in the case favourable to the purchaser.

Warwick v. Warwick.
3 Atk. 294.

Steed v.
Whitaker,
Barnard, 226.

So where lands were settled by *F*, on his marriage in 1734, which he mortgaged among others in 1736, to *W*, who had no notice of the settlement, and *R* was employed as agent in making both the settlement and the mortgage; one question was, whether *W* should be considered as having notice of the settlement, *R* having acted as agent on both occasions? And the Court held, that affecting a person with notice of the title of another, by reason of his agent's having notice of it, had not been carried so far, as to affect the principal, unless where the agent had it, at the time of his transaction with him; and that, as the notice which the attorney had of the settlement, in this case, was two years before the mortgage, the mortgagee could not be affected by it.

Gilb. Eq.
Rep. 7, 8.

It hath not been settled, whether, where one employs an attorney or counsel, and, for want of dispatch, takes the matter afterwards out of his hands, and gives it to another agent to finish, and the first agent acknowledges notice, but no proof of notice of a prior incumbrance can be had against the subsequent agent, notice to the first agent shall bind the party himself.

But it seems reasonable that, *in the case put*, the client should be bound; for the first agent

agent is stated to have entered upon the business, the last agent to have finished it; and the law presumes, that whatever is known to the agent is likewise known to the principal; therefore, as the client must be considered, in law, as taking the business out of the hands of the former agent, with all the information the former agent had thereupon, the client must consequently be considered, either as having lost that knowledge on the transfer to the last agent, which would be absurd, or, as delivering the matter over to him subject thereto; any other construction would open a door to great fraud between a first agent and his client; for then the latter, on discovery that the former had notice, might remove any impediment arising from notice to his first agent, by taking the business out of his hands, and giving it to a new agent.

But the law might be more doubtful, if the first agent, by any accident, had given up the business, *without entering thereupon*; for it would be carrying this doctrine of notice very far indeed, to say, that the mere depositing the papers in an agent's hands, with a view to employ him, and taking them away before inspected, should be notice to the client of a fact, of which the agent, had
he

he inspected them, would have found himself having notice. *Sed quare.*

1 Vez. 63.
Comb. 467.
Waldron v.
Ward,
Styles 449.
contra 10
Mod. 41.

And though counsel, &c. concerned for one of the parties may, if he pleases, demur to being examined as a witness, yet, if he consents, the court will not refuse reading his deposition, for the right to object is *his* privilege, not that of his client.

Hid. 10 Mod.
41.

The time of executing a deed is not such an act, of which an attorney may refuse to give evidence; for a thing of such a nature as the time of executing a deed, could not be called the secret of a client; for that is a thing, of which he may come to the knowledge without his client's acquainting him therewith, and is of that nature, that an attorney concerned, or any body else may inform the Court of it.

Arnot v.
Biscoe,
1 Viz. 95.

Neither can an attorney screen himself under this rule, if he does not disclose to the purchaser of an estate, whether absolutely or by way of mortgage, any incumbrance therein with which he is acquainted; for it is a principle of equity, that in transacting a purchase or bargain, wherever the buyer is drawn in by misrepresentation or concealment of a material fact or circumstance, so

as

as to be injured thereby, and that done with intention and fraud, he is entitled to satisfaction. And this rule is not only applicable to all persons having an interest in the thing contracted about, but also to the agent, attorney, or solicitor of the buyer, having a trust and duty with his principal, who is also liable to make satisfaction, if participant in the transaction. Therefore if the attorney of the vendor of an estate, acquainted that there are incumbrances thereon, treats for his client in the sale thereof, without disclosing them to the purchaser or contractor, knowing him a stranger thereto, and represents it so as to induce the buyer to trust his money thereupon, a remedy lies against him in a court of equity. And it is necessary that courts of equity should adhere to this principle, to preserve integrity and fair dealing between man and man, most transactions being by the intervention of an attorney or solicitor. This case therefore is distinguished from that of disclosing the general circumstances of a client, with the knowledge of which an agent is trusted, of which it would not be proper to give notice.

And if the discovery of that, of which a counsel is called upon to give evidence, be made to him before such time as he is retained,

Cuts v. Pickering,
1 Vent. 197.

ed, he is not entitled to this privilege, but may be sworn.

Vid. Whalley
v. Whalley,
et al.
1 Vern. 484.

If one take a mortgage by assignment from a mortgagee, affected with notice of an outstanding title, he will take subject to that title; for his assignor cannot transfer to him a better right than he has himself.

Ibid.

And if such original mortgagee, in a bill filed by the person setting up an *eigne* title against the mortgagee and his assignee, and praying to be let into possession, charging notice, confess by his answer, that he had notice before the lending of the money; that confession of notice will bind his assignee; for though the mortgagee's answer cannot be read against the assignee as evidence, yet he must stand in his assignor's place, and then his assignor's confession of notice will bind him.

Therefore, if an estate be settled upon trust for raising a specific sum, and afterwards a mortgage be made thereof to a mortgagee, with notice of that trust, and then a subsequent mortgage be made to one who hath notice of the prior mortgage, but not of the antecedent trust of which the first mortgagee had notice, yet the last mortgagee must take subject to that demand; for he, having notice of the first mortgage

mortgage which is prior to his, but posterior to the trust, must consequently take, subject to the first mortgage; and being subject to that, must be subject to every thing *that* was subject to. This may be proved, by considering the right and order of redemption in the Court; as for example, the *cestui que trust* of the trust-estate, having a prior incumbrance, may compel the first mortgagee to redeem him, which if done, the former will have a right in both capacities to compel the last mortgagee, or those claiming the benefit of that mortgage, to redeem him as to both; for a court of equity will not take from the *mesne* mortgagee the legal estate, which he will have got from the trustees, unless his demand be wholly satisfied.

Notice of an act of bankruptcy will not be presumed against a *puisne* mortgagee, who lends his money after the act of bankruptcy committed, to take from him the benefit of an *eigne* incumbrance purchased in; for though, at law, the assignment to the assignees hath relation back to the time of the act of bankruptcy committed, and the construction of statutes be the same in equity as at law, yet it would be too hard to extend a penal law, in a court of equity, to the prejudice of the mortgagee. Besides, where a
statute

statute is to be carried into execution, *in equity*, the rule, *that a purchaser for a valuable consideration without notice* shall not be deprived of any advantage, which will enable him to defend himself, will be applied, as well in cases arising under an act of parliament, as in those occurring at common law.

Collett v.
Dorsets et
Ward,
C. temp.
Talbot, 65.

Thus, where *T* having made mortgages of some parts of his estate, these mortgages afterwards by *mesne* assignment became vested in *W*, and carried with them the legal estate. *T* then became a bankrupt, but, before the assignment of *T*'s effects to the assignees, *W* obtained a release of the equity of redemption from *T*, for a valuable consideration; on a suit brought by the assignees against *W*, to set aside these conveyances, it was held, that a purchaser for a valuable consideration without notice of the bankruptcy, could not be relieved against, within 21 Jac. 1.

And, if the mortgagee hath a better title or right to the legal estate, although it be not conveyed to him, yet he may protect himself thereby, from an act of bankruptcy.

Wilker v
Bodington,
2 Vern. 599.
Sup. 204.

So, where *H B*, on May 1st, 1710, was arrested at the suit of one *S*, for a just debt
of

of 790*l.* secured by bond; he, for delay, pleaded it was for money won at play, and held out the plaintiff above six months, which, although he afterwards paid the debt and many thousand pounds to others, and appeared publicly on the exchange, was adjudged an act of bankruptcy by the statute of *Jac. 1.* Afterwards, in 1717, *H B*, on the marriage of the defendant, his son, made a settlement, by which, after reciting, that he had on his own marriage settled land, on trustees, in trust, to secure 2000*l.* to his wife if she survived; *H B*, with the privity of the trustees, who were parties to it, assigned all his estate, right, title, and interest to the wife's relation for the benefit of *H B* for life, and of his wife for life, &c. The plaintiff *W* was the assignee under a statute of bankruptcy, taken out against *B*, subsequent to the settlement. The question was, whether a court of equity would decree the trustees of the first settlement, to assign the term to the plaintiff, or suffer it to rest in them, to protect the settlement.

For the defendants it was insisted, that they being purchasers without notice of the bankruptcy, equity ought not to impeach their title, if they could defend themselves at law; and that, although they had not the

legal estate in them, yet the trustees of the first settlement, in whom the legal estate was, being parties to the last settlement, were become their trustees. And it was so held by the Chancellor, who said, he took it to be the rule in equity, that where a man was a purchaser without notice, he should not be annoyed in equity, not only where he had a prior legal estate, but where he had a better title, or right, to call for the legal estate than another; and therefore dismissed the bill.

A mortgagee may tack a *puisne* to an *eigne* incumbrance, notwithstanding an intermediate judgment at law; for though of record, it will not affect him, without he be proved to have had express notice thereof, before he lent his money.

Churchill v.
Grove,
1 Ca. Ch. 35.
Sc. Nelson,
89. *Et vid.*
Greswold v.
Marlham,
2 Ch. Ca. 170.

Thus, where the plaintiff, having a judgment and a mortgage, exhibited his bill against the mortgagor, and conusee of a statute by the mortgagor, to have a discovery of what was due on the statute, that being precedent to the plaintiff's securities, and, upon payment, to have the same set aside; the conusee pleaded, that, after the extent, the accounts had been stated between him and the conusor, and an absolute conveyance

conveyance of part of the extended lands had been made to him in consideration of his re-assigning the remainder to the conusor; and that so he was a purchaser for a valuable consideration, without notice of the plaintiff's title.

It was insisted, on behalf of the plaintiff, that his judgment being of record, the defendant was bound to take notice thereof, at his peril, and that, in this case, the defendant ought not to protect his pretended subsequent purchase by his precedent statute, but that he ought, upon payment of the statute, to yield possession to the plaintiff.

Churchill v.
Grove, 1 C2.
Ch. 35. Sc.
Nelson, 89.
Et vid. Gresham v. Mar-
sham, 2 Ch.
C2. 170.

This was strongly opposed by the defendant's counsel, who argued, that though judgments were of record, and a purchaser was bound to take notice of them at law, yet, in equity, where the conusor of a judgment comes to be helped to extend his judgment against a purchaser, he must prove express notice of the judgment in the purchaser, or else shall never be relieved against him; and upon this point the plea was allowed.

Ibid.

But, in the last case, the term, "express notice," must be understood, as used in opposition to constructive notice, arising from

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the act being of record; for I apprehend, what shall, or shall not, be considered as evidence of notice of a judgment, independent of the record, is open to the opinion of the Court, and rests, either in positive proof of the express fact of notice, or in implication from other facts proved, irreconcilable with want of notice of the existence of the fact, notice of which is charged. And, consequently, that if there be any circumstances in the case, from whence it may reasonably be concluded, that the *puisne* incumbrancer had notice of a judgment standing out at the time of advancing his first money, the Court will not suffer him to protect himself by getting in a prior charge on the land, although no express notice be proved.

2 Atk. 392.

A decree made in a Court of equity is not an implied notice to a purchaser of the matter determined, after the cause is ended.

If there be several mortgages of lands lying in a registered county, each of them being registered in their proper order, and afterwards the mortgagee *eigne*, having the legal estate, advances a farther sum of money to the mortgagor, the registry of the intermediate incumbrances will not be constructive notice of them to him, to take from him

him the benefit of protecting himself by his legal title.

Thus, where *A* lent money on lands, the mortgage being duly registered, and afterwards *B* lent money on mortgage on the same security, and his mortgage was also registered, and then *A* advanced a farther sum on the same lands without notice of the second mortgage; it was held, by Lord Chancellor *King*, that the registering of the second mortgage was not *constructive* notice to the first mortgagee before his advancement of the latter sums; for though the statute avoided deeds not registered, as against purchasers, yet it gave no greater efficacy to deeds that were registered, than they had before.

Bedford v. Backhouse,
1 E. Ca. Abr.
615. 12.

So, in a latter case, where *W* advanced 800*l.* on a mortgage in *Yorkshire*, and registered it; afterwards *K* lent a sum of money, and took a judgment for it, which was also registered; then *W* advanced a farther sum, but without any express notice of the judgment; it was argued, on a bill brought by *W* to foreclose, that *K* ought to redeem, on paying the first mortgage; for that, where such registers prevailed, every incumbrancer should be satisfied according to the priority of his register; and that the registering *K*'s

Wrightson et al. v. Hudson et al.
2 E. Ca. Abr.
609. 7.

judgment was constructive notice to *W* sufficient to deprive him of the common benefit of a Court of Equity, whereby a first mortgagee, without notice, was to hold till all subsequent incumbrances due to him were discharged. But it was resolved, that these statutes avoided only prior charges not registered, but did not give *subsequent* conveyances, registered, any farther force against *prior* conveyances registered, than they had before; and that to have affected *W*, *K* ought to have given him notice when he advanced his money; for, though *W* might have searched the register, yet he was not bound so to do.

This construction of the registering act, appears to me consonant to the general principles of law and equity; for, if the second mortgagee had used due diligence, he might have informed himself by the register, who was the prior mortgagee, and by serving an actual notice upon him, effectually secured himself against any farther loan; and therefore this case falls within the common rule, that where, of two persons equally innocent, or equally blameable, one must suffer, the loss shall be left with him on whom it is fallen. The second mortgagee having no more claim to equity than the first, the former

mer will be left in possession of the benefit the law gives him, of protecting himself by the legal estate.

But a subsequent mortgagee, having notice of a prior mortgage not registered, will not gain a priority by registering, because such conduct is considered, in equity, as fraudulent, and the party hath that notice which the act of parliament intended he should have.

Cowper's
Rep. 712.

As, where *N*, in 1718, married his first wife, and, on the marriage, a leasehold estate, in the possession of his father, was covenanted, in consideration of the marriage, and her personal estate, to be settled on trustees, in trust, for *N* for life, then for his intended wife for life, remainder to the issue of the body of *N* by his wife, in such manner as he, by deed or will, should appoint. The marriage was had, and a settlement made, in pursuance of the articles; the wife had issue, and died. In 1743, *N* married a second wife, but, previous thereto, entered into articles with her trustees for settling the very same estate on himself for life, then on her for a jointure, remainder to the issue of that marriage; and a settlement was made pursuant thereto. The estate was subject to the

Le Neve v.
Le Neve,
1 Vez. 64.
Supra, 274.
Sc. 3 Atk.
646, Et vid.
Cheval v.
Nichols.
Strange, 664.
Et Sheldon, v.
Cox, Amb.
Rep. 624.

statute 7 Queen *Anne*, cap. 20, which requires registry. The first marriage articles and settlement were never registered; the second were. *N* also mortgaged this estate, as absolute owner thereof.

The bill was brought by the children of the first marriage, to have the benefit of the settlement made on them, and, in order thereto, to have the subsequent articles and settlement postponed, though registered.

The ground of this application was, that the agent, who made the last settlement, had notice of the first. And, notice to the agent having been fully made out, the principal question was, whether it would affect the defendant's purchase, and oblige the Court to postpone the second articles, and settlement to the first, notwithstanding the registering act?

And the Court determined it would; for the intent of the act was to secure subsequent purchasers and mortgagees against prior secret conveyances, by letting a subsequent purchaser, having registered, prevail against a prior secret conveyance, of which he had no notice; but if he had notice of a prior conveyance, which was vested property, that
was

was no secret conveyance. The statute did not say, that the subsequent purchaser should not be affected by any equity whatsoever; therefore, though the manifest operation of it was to vest the legal estate according to the prior registering, yet it was left open to all equity; for there was no danger to the subsequent purchaser, who might refuse, if he had notice of the prior good conveyance.

And this doctrine was confirmed in the House of Lords, upon an appeal, in the case of Lord *Forbs v. Deniston*, which arose in *Ireland*.

Recited in
last case.

¹ Vez. 67.

² Brown's

Parl. Ca. 425.

But though apparent fraud, or *clear* and *undoubted* notice are held to be a proper ground of relief in cases circumstanced like the preceding ones, *suspicion* of notice, though a *strong suspicion*, was held by Lord *Hardwicke* not to be sufficient to justify the Court of *Chancery* in breaking in upon this *act of parliament*. And therefore, where a mortgagee of lands in *Middlesex*, swore in his answer, that, to *his belief*, he did not know of a judgment which had not been registered, until after his mortgage executed; this was contradicted by *one witness only*, who swore, that, on a conversation at which she was pre-

Hine v.

Dodd,

² Atk. 275.

sent, the mortgagee admitted that it was true
 " he knew of the judgment, but that he
 knew, at the same time, that it was not re-
 gistered, and what were acts of parliament
 for, unless they were effectually observed?"
 Lord *Hardwicke* said, that, undoubtedly, this
 was *material* evidence, but then it was only
one witness against the answer of the defend-
 ant, and the evidence amounted merely to a
 defendant's *confession* in contradiction to his
answer, and was contrary to a positive act of
 parliament made to prevent any temptation
 to perjury from contrariety of evidence. His
 Lordship, therefore, dismissed the plaintiff's
 bill as to this part of the case.

I have not met with any case wherein it
 hath been determined that a *puisne* mort-
 gagee, where there are several incumbrances
 registered, shall protect himself, by purchasing
 in an *eigne* incumbrance, which brings with
 it the legal estate; but that case seems to
 fall within the same reason as the last.

It is evident, from the preamble of the 2d
 and 3d *Ann. c. 4*, that the object of the legis-
 lature, in that statute (which laid the foun-
 dation of the subsequent registering acts)
 was to enable mortgagors to give such satis-
 factory security to monied men, as would
 induce

induce them to advance their money, on landed security, to persons in trade, which it was thought would tend to the national benefit.

The mode adopted by the legislature to effect this purpose, was, to secure them against prior claims, by establishing a register, where all incumbrances that affected the estate might be seen; and by giving securities registered, though posterior in date, a priority: but it was not necessary to alter the law, as to the priority amongst incumbrances registered; for, if a mortgagee neglects searching the registry, he ceases to be an object of legal favour; and, if he searches, and, notwithstanding there be an incumbrance prior to his, lends his money, he takes the equitable estate *only*, with notice, and, having voluntarily accepted it, of course becomes liable to the incidents and contingencies to which that kind of security is, in its nature, exposed.

The true construction of the act therefore seems to be, that it has left mortgagees, whose incumbrances are registered, in the same situation, as to each other, as they were previous to these statutes. In which case, the *puiſne* mortgagee, having purchased in the first incumbrance, would have been entitled

titled to a priority ; he having the best title in law, and as much equity as the *mesne* mortgagee.

Senhouse v.
Earle,
2 Vez. 450.
Perrat v.
Ballard,
2 Ch. Ca. 73.
Ibid, 135,
136.
1 Vern. 27.

It is an infallible rule, that a mortgagee may, in a court of equity, protect himself from discovery of his title-deeds if he denies notice. For, if a plaintiff brings his bill to redeem ever so strongly, he is not entitled to see the mortgagee's title-deeds, because a third person may find out a flaw in them. The rule appears to be the same on motion, where there is to be a sale to raise the mortgage-money ; this is a first principle, and not to be argued, and depends on the denial of notice.

Hall v.
Atkinson,
1 Eq. Ca.
Abr. 333, 4.

Thus, where the plaintiff's bill was to set aside a conveyance made to the defendant by *A*, on the ground that the defendant was no real purchaser, or, if he were, yet, before his purchase, he had notice that the estate was subject to a trust for the plaintiff, and that a lease in the defendant's custody mentioned it ; the defendant swore himself a purchaser without notice of any trust, and that the lease mentioned no such trust. The plaintiff replied. The defendant proved his purchase, and the plaintiff proved no notice upon him. But, at the hearing, it was insisted,

sisted, that he ought to produce the lease to shew there was no mention of the trust; besides, the answer being replied to, it was said, he was bound to prove it, which he could not do, without shewing the deed; for he took upon himself to judge what deed would amount to notice, and what would not, which he ought not to do. For, implied notice being as strong as express notice, if the lease mentioned *only the date and parties of another deed, which mentioned a trust*, it was deemed an implied notice, which the defendant might not know; and, therefore, the Court ought to see it, that they might judge of it.

But it was argued, on the part of the defendant, that being a purchaser, by the rule of the Court he was not obliged to produce this lease, or shew his title; that this was an attempt to alter that rule, by a side-wind, and that it was as easy to say in a bill, it was in some of the deeds, as in any one in particular, and then he must expose them all, which would be of dangerous consequence to purchasers.

It was replied, that if the deed were not Ibid.
produced, then, if one had a mortgage with a proviso of redemption, yet if the mortgagee
was

was hardy enough to swear it an absolute purchase, and the mortgagor had no counterpart, he must lose his estate.

Ibid.

The Master of the Rolls thought, that as this case was, the deed ought to be produced; but the Lord Keeper held otherwise, saying, it was a side-wind to make a purchaser expose his title, which his Lordship would not do, *unless the plaintiff had made some proof, tending to falsify the answer, to induce him to it.*

Anonymous,
Moseley, 246.

And where, upon a decree for a foreclosure *nisi*, the defendant moved, that the plaintiff might lay the deeds before counsel, in order to have the mortgage assigned to one who would advance the money, it was insisted, that such an order was never made. And so it was held; and the Lord Chancellor accordingly made an order that the plaintiff should give the defendant a copy of the mortgage deed, at the defendant's charge, but would not oblige him to produce the title-deeds.

Ibid.

But where the mortgagee consents to a sale, he thereby submits to do every thing which is necessary to a sale; in such case, therefore, he will be compelled to produce the

the title-deeds, the inspection of them being necessary before a sale can be made.

But a refusal to produce the title-deeds, *Ibid.* in case of a decree of foreclosure *nisi*, seems to furnish good reason to enlarge the time to redeem, if the defendant applies to the Court on that head.

Upon a suggestion that the purchase was made at a price greatly under its value, the Court ordered, that the defendant in the suit should answer what, and how much he paid, provided the plaintiff consented to take no advantage of the discovery at law.

Wagstaff v.
Read,
2 Ch. Ca. 157.

If *A* purchases an estate, with notice of an incumbrance, or that it is redeemable, and then sells to *B*, who has no notice, who afterwards sells to *C*, who has notice; by this the notice to *A*, the first purchaser, will not be revived; for, if it were so, an innocent purchaser, without notice, might be forced to keep his estate; he could not sell, and would be accountable for all the profits received *ab initio*. But the interest must be the same in every respect, or the principle does not apply.

Harrison v.
Forth,
Prec. Ch. 51.
Et vid. also
Lowther v.
Carlton,
Ca. temp.
Talb. 187.
Et vid.
Brandlyn
v. Ord,
1 Atk. 571.

Upon this ground, where *A*, who was entitled to the equity of redemption in certain lands,

Lowther v.
Carlton,
2 Atk. 139.

lands, had brought his bill against the representatives of *B*, who was the *mesne* purchaser, and likewise against *C*, who was the *puisne* purchaser; *A* had not replied to the answer of the representatives of *B*, and the question was, whether they should not have been brought before the Court as proper parties? *Et per Lord Hardwicke*, Chan. the representatives of *B* deny he (*B*) had any notice of *A*'s title at the time he purchased, and it is admitted on all hands that *C*, who purchased of *B*, had notice of the title; now, if I should go on with this cause, I should deprive *C* of the benefit he would have from the defence which is set up by the representatives of *B*. It is like the cases at law by warranty, &c. where one defendant is allowed to pray in aid the evidence of another defendant, who has an interest in the thing contested, if it is of use or advantage to him in strengthening his own case. And for this reason, his Lordship allowed the objection, for want of parties in not bringing the representatives of *B* before the Court,

Sweet v. ...
Southcote,
2 Bro. Rep.
Chan. 66.

Again, where a bill was brought to discover whether the defendant, who was assignee of a mortgage, had not notice that the original mortgagor was only tenant for life, stating that

that the title-deed, by which this appeared, was in the defendant's hands; the defendant pleaded that he was assignee of the mortgage, for valuable consideration, and through many assignments from persons who had no notice. It was argued, that this plea was not good; for it should have stated, whether the defendant personally had notice. But the Master of the Rolls allowed the plea, holding that the plaintiff could not call upon the defendant to shew whether he had or had not notice; for whether he had, or had not, was immaterial, if those through whom he claimed had not, he having a right to avail himself of their being purchasers without notice.

Where a mortgagee, after notice of a subsequent mortgage, joined with the mortgagor in sale of the lands to a stranger, it was resolved, that the money received, by either, for the purchase, should sink so much of the mortgage-money.

A purchaser for a valuable consideration shall hold, or take place, against a prior voluntary settlement, though he hath express notice thereof, at the time of his purchase; such voluntary settlement being made void, against a purchaser, with or without notice, by the 27th *Eliz. c. 4.*

Bentham v. Haincourt,
Pre. Ch. 30.

Tonkins v. Ennis,
1 E. Ca. Abr. 334. 6.
Cowper's Rep. 280.
711.
Gardiner v. Painter,
Sel. Ca. Ch. 65. *infra.*

There-

Therefore, if a man make a voluntary deed, and then a mortgage of the same lands, the first deed is fraudulent, as against the mortgagee.

Comber 222,
249. 3 Lev.
388.

But although a conveyance be at first fraudulent, the fraud will be purged, if it be afterwards conveyed over upon valuable consideration, *bona fide*.

Andrew
Newport's
Ca. Rep.
T. Holt, 477.
Sc. Skinner.
423. *Et vid.*
Shirk v.
Clark, et al.
Pre. Chan.
275.

A mortgage made by *K* in 1659, by divers *mesne* assignments vested in *N*; it was objected that it did not appear that any money was paid upon the original mortgage, and therefore it was fraudulent; and being fraudulent in the creation, though *N* paid a valuable consideration, yet this would not purge the fraud, and make it good against one, who was a purchaser *bona fide*, and for a valuable consideration *sed non allocatur*; for *Holt*, Chief Just. said, that the first mortgage was good between the parties, and being so, when the first mortgagor assigns for a valuable consideration, this was all one as if the first mortgage had been upon a valuable consideration, for then the second mortgagee stood in the first mortgagee's place, and therefore was within the proviso of the statute 27 *Eliz. c. 4*, "that no mortgage, *bona fide*,
"and upon good consideration, should be
"impeached by force of this act, but it
"should

" should stand in such force as before the act
 " made;" and if this proviso did not extend
 to the case, to what case should it extend?

And if a valuable consideration passes, the
 Court in such case will not enquire rigidly
 into its adequacy, where the object is a
 family settlement.

Therefore, where the defendant's father, Jones v.
Marth, Rep.
T. Talb. 64.
 some time after marriage, in consideration of
 an additional portion of 100*l.* paid by his
 wife's mother (a receipt whereof was in-
 dorfed upon the deed) settled an estate of
 100*l.* *per annum* upon himself for life, re-
 mainder to his first and other sons, &c.
 and the mother of the defendant's father
 having an interest in this estate, joined with
 him in the conveyance; and the father, thir-
 teen years afterwards, mortgaged this estate,
 with the usual covenants to the plaintiff, and
 died, the plaintiff brought his bill to fore-
 close: And the question was, whether the
 settlement should be looked upon as volun-
 tary and fraudulent against a creditor, who
 lent his money so many years after? *Et per*
Curiam. The question is, whether this be a
 voluntary conveyance or not? here is plain
 proof that 100*l.* was paid, the receipt being
 indorfed upon the back of the deed for a

consideration of 100 *l. per annum*; yet in marriage settlements, things are not to be considered so strictly, there being room for bounty; and every man ought to provide for his wife and family. Besides in this case there was an estate which moved from the defendant's father's mother, and she might in some respect be considered as a purchaser of the limitations made to her grand children; so that it would be very hard to call this a fraudulent settlement, since it was in consideration of a marriage had, and of an additional provision of 100 *l.* paid by the wife's relations, which could not be called voluntary against a creditor, who lent his money thirteen years after,



END OF THE FIRST VOLUME,

